TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]

No. [redacted]

JAMES G. PETRIE, OLIVER O. HAGA, R. F. BLOCHER, ET AL., PLAINTIFFS IN ERROR,

vs.

NAMPA AND MERIDIAN IRRIGATION DISTRICT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

FILED [redacted]

([redacted])

(25,560)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 730.

JAMES G. PETRIE, OLIVER O. HAGA, R. F. BLUCHER, ET AL., PLAINTIFFS IN ERROR,

vs.

NAMPA AND MERIDIAN IRRIGATION DISTRICT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

INDEX.

	Original.	Print
Writ of error	1	1
Return to writ of error	3	1
Transcript of record from the district court of Canyon county (omitted in printing)	v	
Petition (omitted in printing)	3	
Order for publication, &c. (" ")	11	
Demurrer (" ")	12	
Amended petition	18	7
Exhibit A—Minutes of meeting of the board of directors of the Nampa and Meridian Irrigation District, &c.	33	14
B—Exhibit A: Proposed contract between United States and Meridian Irrigation District, &c.	39	15
C—Stock subscription and contract record	54	23
D—Arrowrock Reservoir plan and estimate	60	25
E—Estimate of cost (omitted in printing)	62	
Demurrer to amended petition	68	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 17, 1917.

	Original.	Print
Affidavit of J. B. Eldridge.....(omitted in printing)..	74	
Answer and cross-complaint.....	75	30
Answer of petitioners to cross-complaint, &c.....	96	43
Default .....(omitted in printing)..	98	
Findings of fact and conclusions of law.....	99	44
Judgment	114	53
Clerk's certificate.....(omitted in printing)..	116	
Colloquy between court and counsel, &c. (omitted in printing)	118	
Testimony of George H. Bliss.....(omitted in printing)..	120	
J. H. Lowell.....(" ")..	139	
Joseph L. Burkholder(" ")..	141	
Daniel Barker .....(" ")..	156	
J. A. Remington.....(" ")..	161	
Daniel Barker (recalled) (omitted in printing)	161	
O. O. Haga.....	168	54
William L. Girard....(omitted in printing)..	183	
J. W. Brose.....	194	64
J. A. Remington (recalled).....	197	69
F. E. Rose.....	200	69
J. L. Burkholder (recalled) (omitted in printing)	200	
J. A. Remington (recalled) (omitted in printing)	202	
Reporter's certificate.....(omitted in printing)..	204	
Notice of motion for new trial.....(" ")..	205	
Order denying motion for new trial (omitted in printing)	207	
Notice of appeal.....	208	69
Præcipe for record.....(omitted in printing)..	209	
Clerk's certificate .....(" ")..	210	
Stipulation as to record.....(" ")..	211	
Stipulation as to pleadings, &c.....(" ")..	212	
Stipulation as to original exhibits, &c...(" ")..	213	
Order of submission, &c.....(" ")..	214	
Judgment	215	69
Opinion, Budge, J.....	216	70
Opinion, Morgan, J., concurring.....	235	80
Petition for writ of error and allowance.....	238	82
Assignment of errors.....	242	84
Bond on writ of error.....	248	87
Citation and service.....	250	88
Clerk's certificate	253	90
Designation by plaintiff in error of parts of record to be printed and proof of service of same.....	254	90

I

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Idaho, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Nampa and Meridian Irrigation District, a public corporation of the State of Idaho, respondent, and James G. Petrie, John F. Weirman, Leota P. Lamback, Rosina C. Brose, J. W. Brose, Florence Wilmot, Lafayette Boone, Mrs. William Little, William S. Fisher, John Julion, Mrs. D. M. Byers, A. G. Thompson, A. C. Hill, W. B. Milks, Willis F. Zetzsche, Georgiana Milks, Henry Lietz, Ida F. Mellinger, Alice M. Curtis, John Weidman, John U. Wuest, Marcella S. Pride, Isaac L. Keener, John A. Hulstrom, C. L. Haworth, J. A. Clayville, J. E. Smeed, Ralph Waits, Herbert Aldridge, John H. Waits, E. M. Jackson, George A. Worden, Newton Irish, George L. Myers, James R. Russell, Mrs. A. W. Drake, John Skillern, R. B. McPherson, Charles Story, H. Curtis, Frank Langer, F. F. Maxwell, Frank W. Warren, F. M. Nelson, M. F. Stewart, W. W. Atkinson, Diana Beseker, Justus C. Stearns, H. L. Randall, Ada A. Ulmer, W. A. Pine, C. Monlux, R. C. Crawford, C. Sergeant, G. A. Koger, Henry Jackson, Robert McKinnis, W. L. Thurman, Harry
II Vaughn, W. E. Wines, H. Schwartz, George L. Crandall, C. H. Huntington, Ed. Ashley, E. F. Crawford, Mrs. M. L. Wines, Charles Wartman, John Henderlider, O. J. Folsom, C. F. Hartley, Rose Parkinson Company, Lewis Stott, George Cornish, S. H. Grondahl, J. F. McFarland, S. W. Shook, F. P. Garver, S. H. Nelson, E. Grosso, J. B. Cook, L. F. Abel, W. M. Moreland, D. T. Sillivan, George Muller, W. L. Walker, George McKinnis, A. A. Beasley, G. A. Woodman, L. O. Snider, James C. Scott, Sophia Fowler, W. W. Darling, W. W. Darling, J. S. Boone, Myra L. Monteith, Victor Bernarion, O. W. Alger, R. M. Allumbaugh, William Lunstrum, C. L. Cox, D. I. Stover, A. Lunstrum, A. I. Michael, F. H. Brandt, Lewis W. Griffith, C. E. Gregory, C. N. Dietz, T. M. McClure, N. R. Jones, J. B. Russell, L. C. Russell, J. B. Lewis, Esther Halferty, Amelia A. Coffin, H. B. Illingworth, J. W. Lawler, Charles Drake, J. E. Smeed, L. N. B. Carpenter, W. A. Rankin, Henry Klee, Mary W. Allen, W. W. Briggs, Sarah E. Ash, Frank Martin, Chris Powell, Hester M. Sparkman, F. J. Garver, A. H. Eagleson & Sons, Ira Rohrer, A. F. Graves, E. C. Laughlin, Folsom & Martin, a co-partnership, A. R. Cruzen Investment Company, a corporation, A. Goreczky, Oliver O. Haga, Hunt & Sweet, a co-partnership, Charles C. Tobias, R. F. Blucher, Samuel S. Drake, Mrs. E. A. Drake, Georgia T. Yates and Martin Houcke, appellants, wherein

was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or
III commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said James G. Petrie, Oliver O. Haga, R. F. Blucher, and the other appellants in said cause hereinbefore named, as by their Complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 18th day of August, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States District Court, Idaho, 1890.]

W. D. McREYNOLDS,
Clerk of the District Court of the United States, District of Idaho.
By PEARL E. ZANGER,
Deputy Clerk.

Allowed this 18th day of August, 1916.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

[Endorsed:] No. 2710. In the Supreme Court of the State of Idaho. Nampa and Meridian Irrigation Dist., Respondent, vs. James G. Petrie et al., Appellant-. Writ of Error. Filed Aug. 18" 1916. I. W. Hart, Clerk, by E. S. David, Deputy. Richards & Haga, Boise, Idaho.

IV–17 JAMES G. PETRIE et al., Plaintiffs in Error,
vs.
THE NAMPA & MERIDIAN IRRIGATION DISTRICT, Defendant in Error.

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Idaho, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Idaho, in the city of Boise, this October 10th, 1916.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk Supreme Court of Idaho.

Plaintiffs' costs in Supreme Court, $21.25, paid by James G. Petrie et al.

Defendants' costs " " " $2.25, paid by Nampa & Meridian Irrigation District.

Costs of transcript on appeal to U. S. Supreme Court, $52.50, paid by James G. Petrie et al.

I. W. HART,
Clerk Supreme Court of Idaho.

* * * * * * *

18 (Title of Court and Cause.)

Amended Petition.

To the Honorable the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Canyon:

The petition of H. B. Carpenter, E. H. Dewey and Daniel Barker, constituting the Board of Directors of the Nampa and Meridian Irrigation District, respectfully shows:

I.

That H. B. Carpenter, E. H. Dewey and Daniel Barker, constitute the duly elected, qualified and acting Board of Directors of said District.

II.

That the Nampa and Meridian Irrigation District is a duly organized irrigation district under and by virtue of the laws of the

State of Idaho, and was so organized on or about the 15th day of February, 1904, and that the proceedings for the organization of the said Nampa and Meridian Irrigation District were examined, approved and confirmed by a decree of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, made on the 27 day of Oct. 1905, and entered on the 27 day of October, 1905 and duly recorded at pages 70 of Book "G" of Judgments in said Court, and that said decree ordered, adjudged and decreed that the said Nampa and Meridian Irrigation District was a duly organized irrigation district under and by virtue of the laws of the State of Idaho, which said decree is hereby referred to and by reference made a part hereof.

III.

That the said Nampa and Meridian Irrigation District on
19 or about the first day of January, 1906, acquired what is known as the Ridenbaugh Canal System, which canal system diverts water from the Boise River in Ada County, Idaho, to the lands of said irrigation district, and that said canal system has sufficient capacity to furnish water to approximately 27,000 acres of land in said district and no maore. That the said lands on which said water supply is used are described in the proposed contract hereinafter referred to as "Old Water Right" lands. That said irrigation district has never acquired any other or additional water rights for the irrigation of lands within said district. That approximately 44,060 acres of land in said district are arid and require water for irrigation, and cannot be furnished with water by said district from the *the* present supply, said lands being referred to in the proposed contract as "Project" lands.

That the United States has been engaged since the year 1904 in constructing an irrigation system known as the Boise Project on the bench lands on the south side of Boise River in Ada and Canyon Counties in the State of Idaho, a part of said lands bounding Nampa & Meridian Irrigation District on the southerly side and about 44,060 acres, being the lands hereinbefore referred to as "Project" lands, lying within said district. That the lands included in the Nampa and Meridian Irrigation District are bench lands on the south side of Boise River in the said counties of Ada and Canyon. That the lands above described as "Project" lands lying in said district are a part of the lands of the Boise Project and said Boise Project is being constructed for the purpose of supplying water to the same, with other lands.

20 That said "Old Water Right" lands and said "Project" lands are intermingled together throughout said district and that several thousand acres of said project lands were at all times herein mentioned and still are unpatented lands of the United States. That the economical irrigation of said lands requires that water should be distributed to them through joint and not by separate systems of canals for distribution. That the United States through the said Reclamation Service has constructed such a dis-

tributing system jointly with the distributing system of the said district and that portions of both of said classes of lands are now and for several years past, have been supplied with water for irrigation through said joint systems of laterals operated and managed by said irrigation district under an agreement therefor with the said Reclamation Service of the United States. That said Boise Project is supplied with water through what is known as the New York Canal, which is the high line canal of said project, and that said canal is situated upon the higher lying bench lands than the lands of said district and that the land lying betweeen the said New York Canal and the said Nampa and Meridian Irrigation District are lands of the said Boise Project and are supplied with water from the said New York Canal as the main distributing canal of said project. That the seepage water escaping from said New York Canal and the distributing laterals of the said Boise Project together with the surface waste water resulting from the irrigation of the last described lands of said project and the underground seepage water resulting from such irrigation, naturally move in a northerly direction through and across the lands of said Nampa and Meridian Irrigation District and have their drainage outlet in Boise River. That as the result of the distribution of water for irrigation through said
21 New York Canal and said Ridenbaugh Canal and the use thereof for irrigation on lands in said Boise Project and in said district, large quantities of seepage water have accumulated on tracts of land in said Nampa and Meridian Irrigation District so as to injure and swamp the same and threaten said lands with destruction; that approximately 2,796 acres of the class hereinbefore designated as "old water right" lands of said District and approximately 1,784 acres designated as "project" lands of said district, were so affected in November, 1913. That the area so affected is constantly increasing, and said U. S. Reclamation — through its engineers has made investigations and estimates showing that at the present rate of increase, 6,449 acres of old water right lands and 5,856 acres of project lands will be so affected by the year 1918, and that said lands and other lands of said district will be ruined and destroyed by seepage water unless a drainage system is constructed to protect said lands from said seepage water, that it is not necessary for such purpose to build more than a single drainage system. That said seepage condition results from the use of water for irrigation from the Boise Project and upon said project lands and upon said "old water right" lands of said district as a community and does not result entirely from either source, but results jointly from the water seeping from said canals and each of them, and from the water escaping as surface waste water and underground seepage water from all of the above described lands. That by the provisions of said proposed contract, hereinafter mentioned, the said parties thereto plan the construction of a suitable drainage system for the purposes hereinbefore mentioned, the expense thereof to be borne
22 jointly by the United States and the said Irrigation District.

That the total cost of said drainage system as planned and estimated by the United States Reclamation Service is the sum of

$557,000.00 and after careful negotiation between the officers of the said Reclamation service and the officers of the said Irrigation District, and investigations by the engineers of the said United States Reclamation Service and of the said District, said parties have jointly concluded that the sum of $291,000.00 of said expense should be borne by the United States, and $266,000.00 should be borne by the said Irrigation District, and propose by said contract to jointly bear said expense in said proportion.

IV.

That when the said Boise Project was first promoted, the land owners ow-ing lands in said Project organized the certain corporation known as the Payette-Boise Water Users Association, Ltd. That said corporation was organized at the instance of the United States Reclamation Service for administration purposes and as a means whereby the said United States Reclamation Service might deal collectively with said land owners organized as a co-operative corporation. That all land owners desiring water rights from said Boise project were required to purchase stock in said corporation and to enter into contracts for securing water rights for their lands from said Boise Project. That said contracts were all of the same general character, a copy of which is hereto attached as Exhibit "C" and were duly recorded in the Recorder's Office of the County wherein the land affected thereby was situated. That the water rights distributed by the said district from said Ridenbaugh Canal System are not full season rights but are subject to cut in the lat-er
23 part of the season when the water supply of Boise River is diminishing particularly in dry seasons. That during the years 1905, 1906 and 1907, a large number of land owners in said district receiving water from said Ridenbaugh Canal System entered into agreements of the character above mentioned for the purpose of securing a supplemental water supply of stored water from the Boise Project for use on their said lands during the period of low water. That at such times it was uncertain and doubtful whether stored water was needed to supplement said water rights from the said Ridenbaugh Canal System. That a large number of said land owners contracting for said stored water have now reached the conclusion that such stored water is not necessary for the irrigation of their said lands and are desirous of being released from said contracts. That by the proposed contract hereto attached as Exhibit "B," the said parties agree to cancel and release said contracts for stored water and to permit land owners to purchase from the United States such amounts of stored water through said district as have been applied for by said land owners and no more, the same amounting approximately to 828 acre feet, costing $24,840.

V.

That there are within the boundaries of the said Nampa and Meridian Irrigation District 44,060 acres of land which the said

district is unable to supply with water for irrigation from the canals and water rights now owned by the district, being the lands herein referred to as the "Project" lands of the district. The said lands are arid in character and require water for irrigation in order to produce crops. That the said Boise Project has been con-
24 structed for the purpose of supplying said lands with water. That by the terms of the proposed contract, the United States offers to sell to the district water rights for said lands, and upon terms named in said contract and which are satisfactory to the district.

VI.

That on or about the 25th day of August, 1914, the Board of Directors of the said Nampa and Meridian Irrigation District by a resolution entered upon its records formulated a general plan for drainage and the acquirement of storage water rights and other water rights for the lands of the District, which plan provided that the said District should enter into a contract with the United States for the securing of said water rights and the construction of said drainage works which plan stated what works and other property the district proposed to purchase, and the cost of purchasing the same. A copy of said resolution is hereto attached, marked Exhibit "A" and made a part hereof, the contract referred to therein being hereto attached as Exhibit "B."

VII.

That at said time there was submitted by the United States a proposed contract for supplying full season water rights for the use of said lands lying within said Irrigation district from the Boise Project of the U. S. Reclamation Service, to the amount and value of $3,304,500, and also for supplying stored water from Arrow Rock Reservoir of the said Boise Project, with which to supplement the water rights of said Irrigation District to the amount and value of $24,840 and also for expending $266,000, to be repaid by the district, for the benefit of said Irrigation District in draining the over-
wet lands of the district in conjunction with and as a part
25 of the drainage plans of the United States of America, in providing proper drainage for lands lying under the said Boise Project supplied and to be supplied with water for irrigation from said Project, which resolution included said proposed contract and was based upon surveys, examinations, maps, plans and estimates made by the engineers of the U. S. Reclamation Service, furnished and supplied to the Board of Directors of said Irrigation District and adopted as a part of said plan. That petitioners attach hereto a copy of said contract marked Exhibit "B" and make the same a part hereof.

VIII.

That prior to the 25th day of August, 1914, and for the purpose of ascertaining the cost of that part of the proposed plan relating to

the acquirement of water rights from the Boise Project of the U. S. Reclamation Service, one F. E. Weymouth, as supervising engineer of the U. S. Reclamation Service, made such surveys, examinations and plans as demonstrated the practicability of such plan and furnished the proper basis for estimate of the cost of the carrying out of the same; that such surveys, examinations, maps, plans and estimates were adopted by the said District as a part of said plan, a copy thereof being hereto attached marked Exhibit "D" and made a part hereof, and were certified to said District by said F. E. Weymouth; and that at such time the said F. E. Weymouth was a competent irrigation engineer. Petitioner attaches hereto a copy of said resolution marked Exhibit "A" and makes the same a part hereof. That prior to the 25th day of August, 1914, and for the purpose of ascertaining the cost of that part of the proposed plan known as
26 the "drainage system" provided for as hereinbefore alleged, one J. L. Burkholder, as engineer of the Reclamation Service of the United States, had duly made the necessary surveys, examinations, maps, plans and estimates to demonstrate the practicability of such plan and furnish the proper basis for an estimate of the cost of carrying out of the same; that said surveys, examination, maps, plans and estimates were adopted by said Board as a part of said plan; that said J. L. Burkholder was a competent irrigation engineer and said surveys, examinations, maps, plans and estimates were certified by him to said Board, a copy of which is hereto attached as Exhibit "E." That prior to the 25th day of August, 1914, said District employed one F. C. Horn, a competent irrigation engineer, and the said F. C. Horn carefully examined the said surveys, examinations, maps, plans and estimates, and certified, as engineer for the District, that they demonstrated the practicability of such plans and furnished the proper basis for the estimate of the cost of carrying out the same, and said F. C. Horn at such time approved the estimates of cost hereinbefore mentioned.

IX.

That in pursuance of the aforesaid resolution the secretary of said District conveyed to the State Engineer of the State of Idaho at Boise, Idaho, copies of said maps, plans estimates, surveys and examinations and report, as provided by law, copies of which are hereto attached as Exhibits "A" "B" "D" and "E."

X.

That on or about the 2nd day of September, 1914, the
27 State Engineer of the State of Idaho made and submitted to said Board of Directors a written report upon said surveys, examinations, maps, plans and estimates referred to him by said Board as aforesaid, and that said State Engineer in his report approved the plan of said Board.

XI.

That upon receiving said report of the State Engineer of the State of Idaho said Board of Directors did, on or about the 3rd day of

September, 1914, determine that for the pur- of carrying out said plan the sum of $24,840 was necessary to be raised to purchase the required amount of storage water from said Arrow Rock Reservoir, and that the sum of $3,304,500 was necessary to be raised to purchase the required amount of season water for said lands from the Boise Project of the Reclamation Service of the United States, and that the sum of $266,000, was the amount of money necessary to be raised to construct the part of said drainage properly chargeable to said district; and at such time said Board duly adopted a resolution determining that said amounts of money were necessary to be raised and calling a special election of said district to be held on the 10th day of October, 1914, at which election there should be submitted to the electors of the District the question whether the District should be authorized to contract with the United States of America through the Secretary of the Interior for an interest in the Arrow Rock Reservoir to the amount of $24,840 for storage purposes and for the construction of drainage ditches within said district at the expense of $266,000 and for the purchase of a water right from the Boise Project of the U. S. Reclamation Service for the irrigation of 44,060
28 acres at a cost of $3,304,500, as provided in said contract.

XII.

That notice of said election was duly given by posting notices thereof in three public places in each of the election precincts of said election district on the 5th day of September, 1914, and at least prior to said election, and also by publishing said notice in the Nampa Leader-Herald, a newspaper published in Nampa, Canyon County, Idaho, where the office of said Board is located and within the boundaries of said District, and also in the Meridian Times, a newspaper published in Meridian, Ada County, Idaho, within the boundaries of said precinct, once a week for five successive weeks before said election; that said notice specified the time and places of said election as aforesaid, and the purpose for which said election was being held, the amount of bonds proposed to be issued, and stated that the report of the State Engineer and copies of maps and estimates were on file and open to public inspection by the people of the District at the office of said Board in Nampa, Idaho, and at the office of the State Engineer in the State Capitol at Boise, Idaho; that said Notice further specified that the electors should cast ballots at said election which should contain the words "Contract—Yes" or "Contract—No."

XIII.

That on the 10th day of October, 1914, such special election was held after due notice thereof had been given as aforesaid, and at said election 1,206 votes were cast for "Contract—Yes" and 160 votes were cast for "Contract—No."

XIV.

That on the 12th day of October, 1914, said Board met to canvass

the returns of such special election and the returns from all
29 the election precincts having been received the same were duly canvassed by said Board and on said canvass of said returns it was found that 1,206 votes were cast in favor of "Contract—Yes," and 160 votes were cast against said contract, being for "Contract—No;" that the Board thereupon duly declared that more than two-thirds of the votes having been cast for "Contract—Yes" the question so submitted was duly carried, and the Board was authorized to execute said contract between the United States of America and the Nampa and Meridian Irrigation District for an interest in the Arrow Rock Reservoir in the amount of $24,800, and for an interest in the Boise project of the U. S. Reclamation Service in the amount of $3,304,500, and for drainage in the amount of $266,000, as provided in said contract on which said election was called.

XV.

That on the 2nd day of February, 1915, the Board of Directors passed the following resolution:

"It is for the best interests of said District that each and all of the proceedings for the authorization of the execution of the contract with the United States of America embodied in the plan of this Board for drainage and the purchase of water rights from the United States of America adopted on the 25th day of August, 1914, and authorized by the election held by the District on October 10, 1914, thus far taken be judicially examined, approved and confirmed, and the attorney for the District is hereby notified and directed to proceed to file a petition for that purpose."

XVI.

That the Payette-Boise Water Users Association, Ltd., is a
30 corporation duly organized and existing under and by virtue of the laws of the State of Idaho; that during the years 1905 and 1906 a large number of the land owners within the Nampa and Meridian Irrigation District signed stock subscription contracts with the said corporation known as the Payette-Boise Water Users Association, Ltd., providing for the payment of their proportionate shares of the cost of the construction of the Payette-Boise Project to be constructed by the Government under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), known as the Reclamation Act; that at the time the land owners signed the above mentioned contracts for water stock in said corporation, it was agreed that a credit of $14.00 per acre could be allowed to such land owners in the Nampa and Meridian Irrigation District on account of the value of existing works and rights of the district for said credit to be allowed as a partial off-set against the charge of the Payette-Boise Project; that on account of the changes in the place of the Payette-Boise Project and the increase in the public cost of water rights it was found that the credit of $14.00 per acre which would be allowed to the said lands of the Nampa and Meridian Irrigation District for

its existing works and rights was too small to be equitable and fair; that said contract has been proposed for the purpose of properly adjusting the matters between the said Payette-Boise Water Users Association, Ltd., and the United States which furnished the money to construct the works of the Payette-Boise Project, and to increase the water supply of said district, and relieve the over-wet lands within said District.

XVII.

That under the proposed plan adopted by the Board of
31 Directors of the Nampa and Meridian Irrigation District, a part of which plan is the proposed contract between the United States of America and the Nampa and Meridian Irrigation District, together with the water rights acquired by appropriation, the Nampa and Meridian Irrigation District will secure and furnish sufficient water to the lands of the District which were heretofore signed up in the Payette-Boise Water Users Association, Ltd., and therefore it will be no longer necessary that these lands should individually contract for water from the Government; that the Board of Directors of the Payette-Boise Water Users Association, Ltd., have heretofore duly passed a resolution approving said proposed contract between the United States of America and the Nampa and Meridian Irrigation District, in principle and in general form.

XVIII.

That the Secretary of the Interior of the United States has approved the proposed contract with the Nampa and Meridian Irrigation District as to form and is ready to execute the same and proceed with the construction of the proposed work as soon as the legality and validity of the proposed contract with the Government has been affirmed by the Court.

XIX.

That the aforesaid Arrow Rock Reservoir and the Boise Project and all the works to be constructed by the Government in connection therewith are being constructed primarily for the reclamation of the public lands of the United States, of which there are many thousands of acres to be reclaimed by said works, but it is necessary and desirable in order to avoid making the cost of public lands unreasonable and excessive that the private lands intermingled
32 with and adjoining the public lands of the said project should also be included and be reclaimed and bear a share of the costs.

Wherefore, your petitioners pray that the proceedings for the authorization of the execution of a certain contract with the United States of America and the Payette-Boise Water Users Association, Ltd., a corporation, wherein the United States agrees to sell and the said District agrees to buy reservoir capacity to the amount of $24,800 in the Arrow Rock Reservoir, and the United States of America

agrees to expend in constructing a drainage system in said District the sum of $2 36,000, and the United States of America agrees to sell, and the said District agrees to buy water rights to the amount of $3,304,500 from the Boise Project of the U. S. Reclamation Service, and the United States of America and the Payette-Boise Water Users Association, Ltd., agrees to release such lands within said District as have been subscribed under stock subscription and contract with said Association, be examined, approved and confirmed by this Court.

HUGH E. McELROY,
Attorney for Petitioners.

Duly verified.

33 EXHIBIT "A".

Minutes of a Meeting of the Board of Directors of the Nampa and Meridian Irrigation District, Held Aug. 25, 1914.

Present: H. B. Carpenter, E. H. Dewey and Daniel Barker, Directors; Guy Remington, Secretary of said Board.

The following proceedings were had: The question of formulating a general plan for increasing the water supply of the Nampa & Meridian Irrigation District, and for the drainage of the lands within the district coming on for consideration, thereupon the Board, after full consideration unanimously adopted the following resolution as a general plan for increasing the water supply of the Nampa & Meridian Irrigation District and for the drainage of said District:

Be it resolved, that whereas the law governing irrigation districts provides as follows:

"Said Board may also construct the necessary dams, reservoirs and works for the collection of water for said District and do any and every lawful act necessary to be done that sufficient water may be furnished to each land owner in said district for irrigation purposes."

And it appearing to the Board of Directors of the Nampa & Meridian Irrigation District that the said district will require an additional supply of water to that which would be decreed by the court in the case of the Farmer's Co-Operative Ditch Company v. The Riverside Irrigation District et al, now pending in the District Court Canyon County, Idaho, to irrigate the lands within the boundaries of said district, and the United States of America having submitted to the said district a proposed contract with reference to furnishing an additional supply of water for the irrigation of the dry
34 lands within the district which have heretofore received no water supply whatever from said district, said water to be supplied from the irrigation project of the United States known as the Boise Project, and which contract provides for water from the Arrow Rock Reservoir of the said Boise Project for supplementing the water rights heretofore furnished by said district to lands within said district, and also for securing water for said purposes by drainage of the lands of said district which are deteriorating and becoming

water logged and which will, if not drained, become valueless by reason of being soaked with seepage and waste water and by the rising water table under the lands of said district; and also provides a satisfactory plan for such drainage.

And it appearing to the Board that there are 44,060 acres of land lying within the district and designated in said proposed contract as "project lands," which have not been supplied with water by the district and which cannot at this time be supplied with water by the district from the water rights now owned by it.

And that the Government of the United States is willing to sell the district sufficient water rights for the irrigation of said lands from the irrigation system known as the Boise Project, and that the cost thereof will not exceed in the aggregate the sum of $75.00 per acre for said land, said cost to be assessed by the district to said lands receiving said water rights, the total cost thereof amounting to the sum of $3,304,500.

And it further appearing to the Board that 828 acre feet of water is necessary for the purpose of supplementing the water rights now and heretofore supplied to the lands within the district
35 designated in said contract as "old water right lands" and that the Government of the United States is willing to sell to the district an interest in what is known as the Arrow Rock Reservoir with an estimated capacity sufficient to supply said water, for the sum of $24,840, the cost thereof to be assessed to the lands which have heretofore applied for said water.

And it further appearing to the Board that the several thousand acres of land lying within the district are being injured and are deteriorating and being rendered valueless by reason of being soaked with seepage and waste water and by the rising water table under the lands of said irrigation district, and that the amount of land so affected is increasing each year, so that in a few years it will be impossible to raise crops upon said lands unless said lands are drained and that thereby said lands will be irreparably injured, and the burden of operating the district will then rest upon the lands not waterlogged, causing a heavy burden upon said lands and imperiling the bonded indebtedness of said district, and that it is for the best interests of the district that a drainage system be provided to drain said lands and that such drainage system will accumulate large quantities of water, a portion of which may be returned to the ditches of the district by gravity and pumping thus increasing the available water supply of the district, and that said water supply is necessary for, and can be used, in supplementing the water rights of the district, particularly during the low-water period of the year, and that more water will be required for such purposes than is now owned by the district together with the amounts so as aforesaid to be secured from Arrow Rock Reservoir and the Boise Project.

36 And it further appearing to the Board of Directors that said waste and seepage and said rising water table within the said district are ruining the lands of the district, and that the drainage thereof can be so planned as to provide additional and necessary

water rights for the use of said lands, and the Government of the United States has prepared a plan for such drainage which will accomplish said purposes, and offers to construct the same for the sum of $266,000.00, it being understood that said sum is the part of said drainage properly chargeable to what are termed the "old water right lands" of the district and will be assessed by the district to said lands only, and that no part thereof will be assessed to the lands designated in said contract as the "project lands" of the district, and that the part of the drainage expense properly chargeable to the said project lands will be performed by Government and has been included in the sum to be paid the Government for water rights for said project lands.

And it further appearing to the Board that the engineer of the U. S. Reclamation Service has heretofore made surveys examinations, maps, plans and estimates of that part of the proposed plan known as the "drainage System" and that the same have been received by this Board and certified by one J. L. Burkholder, as Engineer of the Reclamation Service, which surveys, examinations, maps, plans and estimates are hereby referred to and made a part of this plan.

And it further appearing to the Board that the engineers of the U. S. Reclamation Service have made plans for what is known as the "Boise Project of the U. S. Reclamation Service" and the report of F. E. Weymouth, Supervising Engineer of the Reclamation Service, on that part of the proposed plan having reference to what is known as the Boise Project having been received, the said
37 is hereby accepted and made a part of this plan.

And it further appearing to the Board that the said plans of the U. S. Reclaration Service in regard to drainage and water supply have been embodied in a certain contract between the United States and this District, a copy of which proposed contract is hereto attached as a part of the general plan, marked Exhibit "A" and made a part hereof.

And it further appearing to the Board that all such surveys, examinations, maps, plans and estimates were made under the direction of the engineers of the U. S. Reclamation Service particularly J. L. Burkholder and F. E. Weymouth, and certified to by them: and that said engineers are competent irrigation engineers, and that this Board has heretofore employed one F. C. Horn, a competent irrigation engineer, and that said F. C. Horn has carefully examined said Surveys, examinations, maps, plans and estimates and certified that they demo-strate the practicability of such plans and furnish the proper basis for an estimate of the cost of carrying out the same, and has approved the estimates of cost heretofore mentioned.

Now, therefore, it is ordered by the board, that the foregoing shall constitute the general plan of the Board of Directors for the purpose of increasing the water supply of the district and for the purpose of drainage of the district, subject to changes and modifications as good policy and the best interests of the district may direct, and that during the construction of the drainage system the Reclamation

Service shall be called upon from time to time to render a statement of the amount expended and the amount of work done to date, so that the district may be informed as to the progress of the
38 work and the amount expended in such progress.

It is ordered, that the maps, plans and estimates above referred to, together with this Resolution, be submitted to the State Engineer as required by law, and that the secretary of the Board is hereby authorized at the earliest possible moment to convey to the said State Engineer at Boise, Idaho, said maps, plans and estimates for his examination and report.

On motion of the Board adjourned.

Attest:

(Signed) H. B. CARPENTER, *President.*

(Signed) GUY REMINGTON, *Secretary.*

39 EXHIBIT "B."

Copy of the Proposed Contract Between the United States and the Nampa and Meridian Irrigation District, Appearing in the Minutes of the Board of Directors, Held August 25th, 1914.

EXHIBIT A.

Draft of July 24, 1914.

This agreement made this — day of —— 1914, between the United States of American, acting for this purpose by the Secretary of the Interior, under the provisions of the act of Congress of June 17, 1902 (32 Stat. 388) known as the Reclamation Act, and acts amendatory thereof or supplementary thereto, and the Act of Congress of February 21, 1911 (366 Stat. L. 925) the party of the first part, hereinafter called the United States, and the Nampa and Meridian Irrigation District, an irrigation district organized under the laws of the State of Idaho, and located in Canyon and Ada Counties, Idaho, acting for the purposes of this contract under authority of Title 14 of the Idaho Revised Codes, including Sections 2396, 2397 and 2398, the party of the second part, hereinafter called the District.

Witnesseth—that,

Whereas, the District includes within its boundaries about Twenty-four Thousand Five Hundred Fifty-seven (24,557) acres of irrigated land, twenty-two Thousand Six Hundred Twelve (22,-612) acres of which are entitled to receive water from the District; the remainder being irrigated with water from the Settlers' and New York Canals; and whereas, the District owns and controls that certain canal known as the Ridenbaugh Canal through which
40 water is supplied from Boise River to the lands of the District for irrigation and domestic purposes, and whereas, the natural flow of Boise River which the district is entitled to divert under its priorities and appropriations, is insufficent during the

latter part of said irrigation seasons to furnish a complete water supply for the lands of the District, and the District desires to secure a certain amount of stored water in order to furnish its land owners and water users a more complete water supply during the low water periods of the irrigation season, and

Whereas, the ground water table is rising in the District and in places is already close to the surface, so that a large part of the lands of the District are likely to become permanently ruined and incapable of producing crops, or bearing any share of the expense of the District, unless a drainage system is promptly provided; and whereas, it is believed that such a drainage system will reclaim considerable areas which cannot now be cultivated successfully on account of such seepage conditions, and will check the spread of such seepage conditions, and save other large areas which are now threatened with destruction from the same cause; and

Whereas, the United States is now constructing under the provisions of the Reclamation Act, that certain irrigation project known as the Boise Project, including the Arrow Rock and Deer Flat storage reservoirs, and a portion of the lands of the District have been subscribed to said project by the individual owners of said lands; and

Whereas, it is believed that under existing conditions the only way in which the additional water supply and drainage system required by the District can be secured promptly and at a cost
41 which the land owners of the district can afford to pay, is by means of a contract between the United States and the District, under the provisions of the acts of Congress of June 17, 1902 (32 Stat. 388) and February 21, 1911 (36 Stat. L. 925) and Title 14 of the Idaho Revised Codes.

Now, Therefore, it is hereby agreed:

1. That as a part of the general drainages system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars ($557,000). The location of the drains to be constructed is shown on the map attached hereto and marked Exhibit "A" it being understood that in general drains numbered "one" on the said map will be constructed first, drains numbered "two" will be constructed next, drains numbered "three" will be constructed last, so far as said limit of expenditure will allow such work to go, such drainage system to have sufficient capacity in its main drains to carry the seepage water flowing into the district from the lands lying above the district and draining into it, as well as that originating in the district itself. The supervising engineer in charge of such construction shall have the right to make changes in the alignment of the drains shown on the attached map, and in grades and cross-sections, where such changes shall be found in his judgment to be necessary or desirable to increase the efficiency or economy of the system. It is understood that in case any part of the work shown on the said map shall prove unnecessary for the benefit of District lands such part may be omitted by mutual consent of the parties hereto. It is fully

understood that the United States is to expend only Five
42 Hundred Fifty-seven Thousand Dollars ($557,000) including cost of preliminary work in drainage construction for the district under this contract, and to stop when such limit of expenditure has been reached. It is not expected that the lands of the District can be completely drained at this cost, nor a drainage system extended to each farm unit, but that only a number of principal drains will be constructed with which individual and community farm drains can be connected.

2. That for the purpose of this contract, irrigable land- in the district which are now entitled to have ⅜ of a miner's inch of water or more per acre, out of the present water rights of the District, or of the Settlers' District, or through the ownership of stock in the New York Canal Company, are considered as old water right lands and referred to herein under that name; irrigable lands in the District which have no water right from the District or from the Settlers' District and have not been irrigated through ownership of stock in the New York Canal Company, are considered as project lands and referred to herein under that name, and irrigable tracts of land in the District which are entitled to some water from the present water rights of the District or of the Settlers' District or through the ownership of stock in the New York Canal Company, but less than ⅜ of an inch per acre, shall be considered as old water right lands to the extent of the number of acres for which the water right of such tract will provide ⅜ of an inch per acre, and project lands as to the remainder thereof.

3. That the District will pay to the United States for that portion of the above described drainage work in the District equitably
43 chargeable to the old water right lands in the District, the sum of Two Hundred Sixty-six Thousand Dollars ($266,000) in the same number of annual installments not less than ten (10) and the same percentage of the total in each annual installment as is fixed by the Secretary of the Interior for the lands of the Boise Project in his Public Notice announcing the construction charge for the Boise Project, the first installment to be due and payable one (1) year after the day on which said Public Notice for the Boise Project is issued by the Secretary of the Interior, and one installment on the same day of each year thereafter until all installments are paid, and will use the taxing power of the District and all the powers and resources of the District to collect said sums of money and pay the same to the United States when due. The benefits of the expenditures of said sum of Two Hundred Sixty-six Thousand Dollars ($266,000) for drainage shall be apportioned among the old water right lands of the District. No portion of said sum of Two Hundred Sixty-six Thousand Dollars ($266,000) shall be apportioned to the project lands in the district but the balance of the said sum to be expended on drainage works in the District as provided in paragraph one (1) hereof shall be charged to the general expense of the Boise Project and the project lands

in the District shall pay the construction, operation and maintenance charges provided in paragraphs 11 and 12 hereof.

That after the construction thereof the District will maintain said Drainage System in good serviceable condition, at its own expense, and shall charge the cost thereof to the old water right lands in the District in the proportion which the amount of construction cost chargeable to the old water right lands in the District,
44 to-wit, Two Hundred Sixty-Six Thousand Dollars ($266,000) bears to the total construction cost, to-wit, Five Hundred Fifty-seven Thousand Dollars ($557,000), and will charge the balance to the United States. In case the District shall fail or neglect to maintain said drainage system in good serviceable condition, the United States may maintain or repair the same and charge the cost thereof to the District, which cost the District will promptly pay.

5. The right to water developed in the drainage system herein provided for shall belong to the Boise Project and said old water right lands of the District in the same proportion as the cost of the drainage system herein provided, and the drains to be constructed under this contract shall be subject to use by the lands of the Boise Project whether outside or inside the District, as well as the old water right lands of the District.

6. That the District will pay to the United States the sum of Twenty-four Thousand Eight Hundred Forty Dollars for storage capacity in Arrow Rock Reservoir, a reservoir to be constructed by the United States in Boise and Elmore Counties Idaho, and to have a capacity of between 200,000 and 250,000 acre feet, and the United States will provide for the District that portion of the total storage capacity of the Arrow Rock Reservoir which Twenty-four Thousand Eight Hundred Forty Dollars is the total cost of said reservoir, and will deliver at the downstream end of the outlets of the Arrowrock Reservoir, for the District each year after the completion of said reservoir the same proportion of the stored water available from said reservoir at such times after three (3) days' notice from
45 the District to the United States officer in charge, and in such quantities as the District may direct not in excess of the District's proportionate part of the available outlet capacity. The total cost of said reservoir will be determined and stated by the Secretary of the Interior in his Public Notice of the charges to be made for the Boise Project, and to include all cost and expenses of whatsoever nature or kind for the purpose of, growing out of, in connection with or resulting from the construction of said reservoir including engineering expenses and overhead charges, and such interest, if any, as may be payable on account of advances under the provisions of the Act of Congress of June 25, 1910, (36 Stat. L. 835) or other legislation by Congress.

The said sum of Twenty-four Thousand Eight Hundred and Forty Dollars shall be paid by the District to the United States in the same number of annual installments not less than ten (10) and the same precentage of the total in each annual installment as is fixed by the Secretary of the Interior for the lands of the Boise

Project in his Public Notice announcing the construction charge for the Boise Project, the first installment to be due and payable one (1) — after the day on which said Public Notice for the Boise Project is issued by the Secretary of the Interior and one instalment on the same day of each year thereafter until all installments are paid; and the District shall use the taxing power of the District, and all the powers and ressources of the District to collect said sums of money, and pay the same to the United States when due, and will also pay each year its proportionate share of the cost of operation and maintenance of said reservoir and delivery of water therefrom, as announced by the Secretary of the Interior.

46 No interest will be charged on any of the said instalments for drainage work, or stored water, or money to be paid to the United States for operation and maintenance, on account of the drainage works or stored water, until due; but any part thereof which may remain unpaid after the same is due shall bear interest from maturity until paid at ten per cent (10%) per annum, and the United States shall not be obliged to deliver or turn out for the district any stored water while the district is in default on any of the payments herein provided to be made by the District to the United States.

9. The District agrees to distribute the amount of water delivered to it by the United States under this contract in full compliance with the provisions of said Reclamation Act of June 17, 1902, and the rules and regulations thereunder, and to use and distribute the same only upon the lands within the District, and in compliance with the provisions of Section 2 of the Act of Congress of February 21, 1911 (36 Stat. L. 925) known as the Warren Act.

10. The stored water from the Arrow Rock Reservoir hereinabove agreed to be purchased by the District, shall be diverted from Boise River through the canal system of the District and delivered to old water right lands in the District to supplement the water supply of such lands at times when the natural flow of Boise River is insufficient, and the benefits and costs of such stored water shall be apportioned to such lands; Provided, however, that no portion of said stored water is to be delivered and no part of the cost thereof apportioned to those old water right lands of the District to which the first priority right of the district has been allotted under the

47 classification of lands as to priority, which has been made by the district, it being considered that the lands having the first priority right need no stored water.

11. For the project lands in the District, the United States will provide both storage capacity in the reservoirs of the United States, and carrying capacity in the United States Canal System of the Boise Project, and each year after the completion of the Arrow Rock Reservoir, will deliver to the District for distribution to the project lands in the District lying under the canal system of the District, as nearly as practical, the same proportionate share per acre of the water actually available from the said works of the United States, both flood water and stored water, as is provided for similar lands in the United States Boise Project, outside of the District, except as

otherwise provided in Paragraph 12 hereof, but not more, however, than is needed for beneficial use on said lands, and for the project lands lying above the canal system of the District a similar water supply will be furnished directly by the United States through the laterals and canals of the United States. The water supply for the lands in the District shall be carried through the main canal of the United States Boise Project, and that portion for the project lands lying under the canal of the District delivered to the District at convenient points in the District where laterals or distributing canals from the Canal System of the United States reach or cross the canal of the District, and will there be received by the District and distributed by the District to the project lands of the District entitled to the use thereof; under the provisions of a certain contract for
48 the distribution of water, between the parties hereto, dated April 1, 1909, it being understood that the said certain contract shall remain in effect until such time as a a new contract shall be mutually agreed upon by the parties hereto, providing for a different method of distribution of water and division of the cost of distribution.

12. The District will promptly apportion to the project lands in the District a total of Three Million Three Hundred Four Thousand Five Hundred ($3,304,500) Dollars, being a charge of Seventy-five ($75.00) Dollars per acre as the benefits under this contract to said lands; provided, however, that if the building charge per acre announced by the Secretary of the Interior in his Public Notice for similar lands of the Boise Project, is less than Seventy-five ($75.00) Dollars per acre, then the assessment of benefits against the project lands in the District shall be reduced to the same amount per acre as is announced by the Secretary of the Interior for similar lands of the Boise Project, and the District will collect the sums so apportioned to such project lands in the District and pay the same to the United States in the same number of annual instalments not less than ten (10) and same schedule of graduated payments as is fixed by the Secretary of the Interior in his Public Notice for similar lands of the Boise Project outside of the District. Provided, that should the construction charge per acre as announced by the Secretary of the Interior, for the Boise Project for a full water right, be in excess of Seventy-five Dollars ($75.00) per acre of irrigable land, the benefits to be assessed to the project lands in the District under this contract and collected by the District under this contract from the said project lands for the payment to the United States
49 of the construction charge, shall nevertheless be only Seventy-five Dollars ($75.00) per acre and the number of instalments and the percentage of the total payable in each annual instalment shall be the same number and percentage as for the lands of the Boise Project outside of the District but in that event the amount of both stored water and flood water furnished for such project lands in the District by the United States shall be the same proportion of the amount furnished per acre to the lands of the Boise Project outside the District as Seventy-five Dollars ($75.00) per acre is to the charge announced for the Boise Project lands outside the District;

Provided, that in that event the owners of project lands in the District, individually, or the District on behalf of all the project land owners in the District, may, if they or it so elect, by supplemental contract with the United States, secure from the United States works additional water sufficient to make their water rights equal in amounts per acre to the rights furnished by the United States to similar project lands outside the district, by payment of the difference between Seventy-five ($75.00) Dollars per acre and the charge announced by the Secretary of the Interior in his Public Notice for the lands of the Boise Project outside of the District, but the amount to be apportioned to the project lands in the District under this present contract shall not be in excess of Seventy-five ($75.00) Dollars per acre. The instalments of the charges apportioned to the project lands in the District shall be due and payable from the District to the United States on the same dates as fixed by the Secretary of the Interior in his Public Notice for the payment of the charges for the lands of the Boise project outside
50 of the District. The District will be reimbursed by the United States for the cost of distributing the water to the said project lands in the District by the payment to the District of the pro-rata share of the cost of operation and maintenance in the contract of April 1, 1909, between the District and the United States, until the expiration of said contract as provided in paragraph 11 hereof and thereafter under the new contract provided to be made in paragraph 11 hereof. The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project and the same shall be collected by the District for the United States and paid over by the District to the United States, and upon notice of the officer of the United States in charge of the Boise Project, the District will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge.

13. It is fully understood that the old water right lands of the District shall not in any event be liable for any part of the charges herein agreed to be apportioned to and collected from the project lands, nor the project lands for any portion of the charges herein agreed to be apportioned to or collected from the old water right lands in the District and the United States agrees to waive the right to hold either of said two classes of land for any part of the charges herein agreed to be apportioned to and paid by the other, but will look to the old water right lands for the old water right land charges and to the project lands for the project land charges.

14. No interest will be charged on any of said instalments for water to be supplied to said project lands in the District
51 until due, but any part thereof which may remain unpaid after the same is due, shall bear interest from maturity until paid at ten (10% per cent per annum and the United States shall not be obliged to deliver or turn out for the District any water for such project lands in the District as are in default on any of the payments herein provided to be made. Provided, the project lands

in the District shall be subject to the same provisions as to residence, cultivation and limit of area as the lands of the Boise Project outside of the District.

15. The United States will assent to the release by the Payette-Boise Water Users' Association of such lands in the District as have been subscribed under stock subscription and contract to the said association, and have therefore become subject to the lien provided in such subscription and contract for the payment of a proportionate part of the cost of the Payette-Boise Project from the lien and obligation of such stock subscription, and also release and cancel the contract under date of October 12, 1906, between the Nampa & Meridian Irrigation District and the Payette-Boise Water Users' Association, providing for a credit to the subscribed lands of the District for existing works, as regards both the old water right lands and the project lands.

16. The Payette-Boise Water Users' Association agrees to join in the release of said stock subscription contracts and liens upon conditions above stated, and its name is subscribed hereto in evidence thereof.

17. Where any appropriations of water have been made and water rights acquired by parties other than the District out of any of the draws, sloughs, or natural channels of *of* the Nampa & Me-
52 ridian Irrigation District, and such rights are interfered with by the deepening of such channels and the construction of said drainage system in the District, it is understood that the money herein provided for the construction of drainage works shall be available for the satisfaction of any just claims for damages and of judgments, liabilities or obligations on account of, growing out of, or resulting from the interference with any such rights by the deepening of such channels and construction of such drainage system, and that the United States may pay such claims, judgments, liabilities and obligations out of said money. Any lateral construction which may be agreed upon between the District and the United States as being necessary to replace the rights of flow through natural drainage lines, may be built by the United States as a part of the drainage system herein contemplated.

In witness whereof, *that* parties hereto have caused their names and seals to be attached the day and year first above written, the Nampa & Meridian Irrigation District, and the Payette-Boise Water Users' Association, acting in pursuance of resolutions of their Board of Directors, of which certified copies are hereto attached and made a part hereof.

NAMPA & MERIDIAN IRRIGATION DISTRICT,

By —— ——,

—— ——,

PAYETTE-BOISE WATER USERS' ASSOCIATION,

By —— ——,

—— ——,

Secretary of the Interior, for and on Behalf of the United States.

53 Reference is here made in the transcript to Map marked Exhibit A, and showing location of proposed drainage ditches, a copy of which is attached to the foregoing pleadings.

54 EXHIBIT "C."

Stock Subscription and Contract Record, Ada County, Idaho.

Instrument No. 18166.

No. 111A. Stock Subscription and Contract.

Know all Men by these Presents, That I, Malinda Marcellus, do hereby subscribe for and agree to take 184 shares of the capital stock of the Payette-Boise Users' Association, Limited, a corporation duly organized under the laws of the State of Idaho, and in conformity with the by-laws of said Association and in consideration of the benefits to be received therefrom, I hereby covenant and agree as follows:

The said shares of stock and all rights and interests represented thereby or existing or accruing by reason thereof or incident thereto, are to be inseparably appurtenant to the following described real estate, that is to say:

All that parcel of land lying south of the railroad in Section Eleven, Township 3 North, Range One West B. M. Ada County.

The undersigned hereby agrees that the right to any water heretofore appropriated by him or by his predecessors in interest for the irrigation of the lands above described or customarily used thereon, shall become appurtenant to such lands and be and remain incident to the ownership of the above shares appurtenant to such lands. There shall be further incident to the ownership of such shares the right to have the water delivered to the owner thereby by the Association for the irrigation of said lands, as the Association shall from time to time acquire or control means for that purpose: Pro-
55 vided that the whole amount of water actually delivered to such lands from all cources shall not exceed the amount necessary for the proper cultivation thereof.

It is agreed and understood that the records of the Association, as well as the certificate or other evidence or ownership of the shares of stock in the Association when issued, shall contain a description of the land irrigated, as above described, and to which the aforesaid rights and shares shall be perpetually appurtenant, and hereafter all rights, whatever their source or whatever their manner of acquisition, to the use of water for the irrigation of said lands, shall forever be inseparably appurtenant thereto, together with the said shares of stock, and all rights and interest represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of this contract or of by-laws of this Association, or by operation of law, or by the voluntary abandonment thereof by deed, grant or other instrument, or by non-user for the

term prescribed by law; but no such abandonment shall be for the benefit of any person designated by the undersigned or his successors, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver or declaration of abandonment of any kind.

Provided, however, That if for any reason it should at any time become impracticable to beneficially use water for the irrigation of the land to which the right to the use of the water is appurtenant, the said right may be severed from said land and simultaneously transferred and attached to other lands to which shares of
56 stock in this Association are or shall thereby be made appurtenant, if a request for leave to transfer, showing the necessity therefor, shall have been allowed by a two-thirds vote of the Board of Directors at a regular meeting and approved by the Secretary of the Interior.

Every transfer of the title to said lands to which the said shares and rights are appurtenant, whether by grant or by operation of law (except where the land may be subjected by grant, or involuntarily under any law, to an easement, the exercise of which does not interfere with the cultivation of the soil by the servient owner,) shall operate, whether it be so expressed therein or not, as a transfer to the grantee or successor in title, of all rights to the use of water for the irrigation of said lands, also all rights arising therefrom, or incident to, the ownership of such shares, as well as the shares themselves, and upon presentation to this Association of proof of any such transfer of land the proper officers shall transfer such shares of stock upon its books to the successor in title to said lands.

Any transfer or attempted transfer of any of the above shares of this Association, made or suffered by the owner thereof, unless simultaneously a transfer of the land to which it is appurtenant is made or suffered to or in favor of the same party, shall be of no force nor effect for any purpose and shall confer no rights of any kind whatsoever on the person or persons to whom such transfer may have been attempted to be made.

As a condition of continued ownership of said shares of stock and participation of any of the benefits thereof, the undersigned or his transferee, agrees to make prompt application for a water
57 right to the proper authorities of the United States for the land represented by his shares, and duly proceed to the perfection thereof, in full compliance with the law applicable thereto, and the rules and regulations established in pursuance thereof, as soon as official announcement shall be made that water for such lands is available from the works constructed, owned or controlled by the United States.

Upon the failure of the undersigned or his successor to make prompt application for such water right for said land, or to comply promptly and in good faith with the law and the rules and regulations applicable thereto, he shall forfeit to the Association the said shares of stock and all rights incident thereto, or that could by any means be claimed thereunder; and the undersigned, his heirs and

assigns, shall thereafter have no right whatsoever as a member or shareholder of this Association, as to such shares.

No payments of the shares of capital stock of this Association shall be required, except in the following manner: The undersigned shall, as prescribed in this contract, make application to the proper representative of the United States for a water right, at the rate of not to exceed one share for each acre. Upon proper proof to the Association that such application has been accepted, and that he has complied with all the requirements in relation thereto, such subscriber shall be deemed to have paid on his stock subscription the amount then paid to or for the use of the United States for such right, and when all the payments required for such right shall have been made, and when proper evidence of the perfection of such water right has been issued, his stock shall be deemed and held to
58 to have been fully paid up; and until fully paid the payments due thereon shall be a lien upon such lands and shares and the said lien enforced by foreclosure and sale of said stock and lands, or so much thereof as may be necessary, in the manner provided by law for the foreclosure of mortgages; and the purchaser at such sale shall be entitled to the benefit of all payments on the water right appurtenant to the land purchased, and shall take said lands subject to the obligations and conditions herein provided.

Assessments shall become, from time to time, as they are made and levied a lien on said lands of the undersigned and his transferee against which they are levied, and upon the said shares of stock and all rights and interests represented by such shares; and until they are paid or otherwise discharged shall be and remain a lieu thereon. The manner of enforcing said lien shall be by foreclosure and sale of the stock and lands as herein provided for payments on capital stock.

In witness whereof *we* have hereunto set *our* hands and seals, this 20th day of December, 1904.

MALINDA MARCELLUS. [SEAL.]

STATE OF IDAHO,
County of Ada, ss:

On this 20th day of December, in the year nineteen hundred and four, before me, W. H. Peer, a notary public in and for said County, personally appeared —— —— known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same, and on this — day of — 190–, before me, the officer above described, personally appeared
59 Mrs. Malinda Marcellus, known to me to be the person whose name is subscribed to the within instrument, described as a married woman, and upon an examination without the hearing of her husband, I made her acquainted with the contents of the instrument and thereupon she acknowledged to me that she executed the same and that she does not wish to retract such execution.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

W. H. HEER,
Notary Public.

The above Subscription and Contract was accepted and approved by the Payette-Boise Water Users' Association, Limited, at a meeting of the Board of Directors held on the 9th day of October, 1906.

[SEAL.] PAYETTE BOISE WATER USERS ASSOCIATION, LIMITED,
By J. H. LOWELL, *President.*

Attest:
A. A. RICHARDS, *Secretary.*

60 EXHIBIT "D."

Arrowrock Reservoir.

Plan and Estimate.

The Arrowrock Reservoir is to be formed by the construction of Arrowrock Dam across Boise River at a point known as Arrowrock and located in Section Thirteen (13), Twp. three (3) North, Range four (4) East B. M.

The location and general form of the reservoir is shown on the attached map thereof which is marked Exhibit "B" and made a part hereof.

The estimated available storage capacity of the Arrowrock Reservoir is Two Hundred Thirty-five Thousand (235,000) acre feet.

The Arrowrock Dam is a gravity section concrete dam, arched upstream, maximum height of dam from bed rock approximately Three Hundred Fifty-one (351) feet.

The estimated cost of the dam is Six Million Five Hundred Thousand ($6,500,000) Dollars.

The part to be paid by the Nampa & Meridian Irrigation District is to be paid in not less than ten (10) annual instalments without interest.

The general plan of the Arrowrock Dam is shown on the attached cross-section and general plan marked Exhibit "*c*" and Exhibit "D," and made a part hereof.

Certificate.

I hereby certify that the foregoing estimate of the Arrowrock Reservoir; that the same was made from actual surveys and investigations in the field carried on under my charge, and to the best of my judgment is correct.

F. E. WEYMOUTH,
Irrigation Engineer.

61–67 Reference is here made in the transcript to Map marked Preliminary Cross Section of Arrowrock Dam, to Map marked Arrowrock Reservoir, and to Map marked Topography and Layout at Arrowrock Dam, and referred to in Exhibit "D" attached to the foregoing pleading as Exhibits "B," "C," and "D."

* * * * * * *

68 (Title of Court and Cause.)

Demurrer to Amended Petition.

Comes now Jas. G. Petrie, John F. Weirman, Leota P. Lamback, Rosina C. Brose, J. W. Brose, Florence Wilmot, La Fayette Boone, Mrs. Wm. Little, Wm. S. Fisher, John Julion, Mrs. D. M. Byers, A. G. Thompson, A. C. Hill, W. B. Milks, Willis F. Xetzsche, Georgiana Milks, Henry Lietz, Ida F. Melinger, Alice M. Curtis, John Weidman, John U. Wuest, Marcella S. Pride, Isaac L. Keener, John A. Hulstrom, C. L. Haworth, J. A. Clayville, J. E. Smeed, Ralph Waits, Herbert Aldridge, John H. Waits, E. M. Jackson, Geo. W. Worden, Newton Irish, George L. Myers, Jas. R. Russell, Mrs. A. W. Drake, John Skillern, R. B. McPherson, Charles Story, H. Curtis, Frank Langer, F. F. Maxwell, Frank W. Warren, F. M. Nelson, M. F. Stewart, W. W. Atkinson, Diana Beseker, Justus C. Stearns, H. L. Randall, Ada A. Ulmer, W. A. Paine, J. C. Nelson, C. Monlux, R. C. Crawford, C. Sargeant, C. A. Koger, Henry Jackson, Robt. McKinnis, W. L. Thurman, Harry Vaughn, W. E. Wines, H. Schwartz, Geo. L. Crandall, G. H. Huntington, Ed Ashley, E. F. Crawford, Mrs. M. L. Wines, Chas. Wartman, John Henderlider, O. J. Folsom, C. F. Hartley, Rose Parkinson Co., Lewis Stott, Geo. Cornish, S. H. Grondahl, J. F. McFarland, S. W. Shook, F. P. Garver, S. H. Nelson, E. Grosso, J. B. Cook, L. F. Abel, W. M. Moreland, D. T. Sillivan, Geo. Muller, W. L. Walker, Geo. McKinnis, A. A. Beasley, G. A. Woodman, L. O. Snider, Jas. C. Stott, Sophia Fowler, W. W. Darling, *W. W. Darling*, J. S. Boone, Myra L. Montieth, Victor Bernariom, O. W. Alger, R. M. Allumbaugh, Wm. Lunstrum, C. L. Cox, D. I. Stover, A. Lundstrum, A. I. Michael, F. H. Brandt, Lewis W. Griffith, C. E. Gregory, C. M. Dietz, T. W. McClure, N. R. Jones, J. B. Russell, L. C. Russell, J. B.
69 Lewis, Esther Halferty, Amelai A. Coffin, H. B. Illingworth, J. W. Lawler, Chas. Drake, J. E. Smeed, L. N. B. Carpenter, W. A. Rankin, Henry Klee, Mary W. Allen, all being residents, land-owners and electors within the said Nampa-Meridian Irrigation District, and W. W. Briggs, Sarah E. Ash, Frank Martin, Chris Powell, Hester M. Sparkman, F. J. Garver, A. H. Eagleson & Sons, Ira Rohrer, A. F. Graves, E. C. Laughlin, Folson & Martin, a co-partnership, A. R. Cruzen Investment Co., a corporation, A. Goreczky, Oliver O. Haga, Hunt & Sweet, a co-partnership, Chas. C. Tobias, R. F. Blucher, Samuel S. Drake, Mrs. E. A. Drake, Georgia T. Yates, Martin Houcke, all of said immediately above named persons being land-owners in said irrigation district but not residents therein, but whose rights are identical with all of the above appear-

ing named persons, and who will be affected by the proceedings in this cause, all being electors, taxpayers and residents of the State of Idaho, and owning approximately one-third of the irrigated land in said district, and demur and object to the amended petition of the said Board of Directors of the said Nampa-Meridian Irrigation District, and for ground of demurrer allege and state:

I.

(*a*) That said petition does not state facts sufficient to constitute a cause of action, and does not state facts sufficient to entitle petitioners to the relief prayed for, or for any relief.

(*b*) That said petition asks for confirmation of a blank contract executed by nobody, and between nobody, and nobody.

(*c*) That the matters presented to the Court for its ruling are mere moot matters and are merely prospective, and are not matters of fact or facts, and present no issues or facts to be determined by this Court.

II.

That the Court has no jurisdiction of the subject matter in that the proposition and subject matter arises under the laws of the United States of America, and not under the laws of the State of Idaho.

III.

That the Court has no jurisdiction of the person either of the United States or of the Secretary of the Interior, and would be powerless to enforce said contract if entered into, or redress a breach thereof.

IV.

That there is a defect of parties petitioners in that this Court is asked to pass upon the rights of the Payette-Boise Water Users' Association, an Idaho corporation, and the rights of its stockholders without said corporation being before the Court, and which said corporation has not been served with process, or in any sufficient manner being summoned before this Court, or at all.

V.

(*a*) That the petition is ambiguous, in that it cannot be told therefrom, or from Par. III thereof, why a joint instead of separate systems of Canals is required, no facts having been alleged to support the conclusions stated.

(*b*) That the petition is ambiguous in that it cannot be told therefrom, or from Par. III thereof, what "classes" of lands and what proportion of lands have been supplied jointly with water under the management of the District, under said agreement; nor can

it be told what the terms of agreement are, only reference to said agreement being pleaded and no terms or fact with respect
71 thereto being stated.

(*c*) That the complaint is ambiguous in that it cannot be told therefrom what proportion of said wet lands results from seepage from said Government New York Canal, so the Court may determine the relative liability of the Government to equitably safeguard the district by draining its seepage waters and enable the court to determine whether or not the sums proposed to be spent are properly proportioned according to the liabilities and responsibilities resting upon the Government and the district from seepage caused by each through their works respectively.

(*d*) That the petition is ambiguous in that it cannot be told therefrom how or in what manner the U. S. Government and the officers of said district, or what officers of the district, and the said engineers arrived at the conclusion that the Government should bear $291,000.00, and the District $263,000.00 no facts having been pleaded so that the court may be fully advised, as well as the appearing defendants herein, who have a right to be informed.

(*e*) That the petition is ambiguous in that it cannot be told therefrom whether or not the said wet lands only became so beginning with the year 1913, that the court may know if such seepage began before or since the use of the New York Canal by the Government of the U. S., nor does it appear whay a single drainage system is better, no facts appearing to support such conclusion.

(*f*) That the petition is ambiguous in that it cannot be told therefrom what person or persons entered into said contracts with the said Payette-Boise Water Users' Association so as to inform the appearing defendants herein if they are among such persons whose rights are involved herein.
72

(*g*) That the petition is ambiguous in that it cannot be told therefrom how or why it was "doubtful" whether stored water would be needed when said contracts were entered into, or what has happened, if anything, to dispel that doubt and render more clear the situation with respect to the necessity of stored water: nor can it be told what land-owners have "concluded" that stored water is necessary.

(*h*) That the petition is ambiguous in that it cannot be told therefrom how or why it was necessary for the District to enter into said contract and assume the obligation of $3,304,500.00 for the irrigation of said lands under the Boise Project of the United States, as it is set out in the petition, Par. V thereof, "said project being constructed for the purpose of supplying said lands with water" and which the Government is duty bound to supply with water without regard to the Nampa-Meridian Irrigation District on public lands, and all others, if the owners desire water for their respective holdings.

(*i*) That the petition is ambiguous in that it cannot be told therefrom how or why it is necessary or desirable that the said irrigation district should assume such enormous liability as alleged in Par. XIX "in order to avoid making the cost of public lands unreason-

able and excessive" and thus assume the role of philanthropist to the Government of the United States.

VI.

That the petition is unintelligible for all the reasons set forth in Par. V, subdivisions (*a*) to (*i*) inclusive.

VII*I*.

There is no law by which or under which the said Gov-
73 & 74 ernment of the United States of America may enter into said proposed contract with the Nampa-Meridian Irrigation District for the purposes set forth therein.

Wherefore the above appearing parties pray that the said amended petition be dismissed and the relief prayed for therein be denied.

J. B. ELDRIDGE,
FLOYD C. WHITE,
Attorneys for the Above-named Appearing Parties, Residence at Boise, Idaho.

Filed April 12, 1915.

* * * * * * *

75 (Title of Court and Cause.)

Answer and Cross-complaint.

Comes now Jas. G. Petrie, John F. Weirman, Leota P. Lamback, Rosina C. Brose, J. W. Brose, Florence Wilmot, Lafayette Boone, Mrs. Wm. Little, Wm. S. Fisher, John Julion, Mrs. D. M. Byers, A. G. Thompson, A. C. Hill, W. B. Milks, Willis F. Zetzsche, Georgiana Milks, Henry Lietz, Ida F. Mellinger, Alice M. Curtis, John Weidman, John U. Wuest, Marcella S. Pride, Isaac L. Keener, John A. Hulstrom, C. L. Haworth, J. A. Clayville, J. E. Smeed, Ralph Waits, Herbert Aldridge, John H. Waits, E. M. Jackson, Geo. A. Worden, Newton Irish, Geo. L. Myers, Jas. R. Russell, Mrs. A. W. Drake, John Skillern, R. B. McPherson, Charles Story, H. Curtis, Frank Langer, F. F. Maxwell, Frank W. Warren, F. M. Nelson, M. F. Stewart, W. W. Atkinson, Diana Boseker, Justus C. Stearns, H. L. Randall, Ada A. Ulmer, W. A. Pine, J. C. Nelson, C. Monlux, R. C. Crawford, C. Sergeant, G. A. Koger, Henry Jackson, Robt. McKinnis, W. L. Thurman, Harry Vaughn, W. E. Wines, H. Schwartz, Geo. L. Crandall, C. H. Huntington, Ed Ashley, E. F. Crawford, Mrs. M. L. Wines, Chas. Wartman, John Henderlider, O. J. Folsom, C. F. Hartley, Rose Parkinson Co., Lewis Stott, Geo. Cornish, S. H. Grondahl, J. F. McFarland, S. W. Shook, F. P. Garver, S. H. Nelson, E. Grosso, J. B. Cook, L. F. Abel, W. M. Moreland, D. T. Sillivan, Geo. Muller, W. L. Walker, Geo. McKinnis, A. A. Beasley, G. A. Woodman, L. O. Snider, Jas. C. Scott, Sophia Fowler, W. W. Darling, *W. W. Darling,* J. S. Boone, Myra L. Montieth, Victor Bernariom, O. W. Alger, R. M. Allumbaugh, Wm. Lunstrum, C. L.

Cox, D. I. Stover, A. Lunstrum, A. I. Michael, F. H. Brandt,
76 Lewis W. Griffith, C. E. Gregory, C. N. Dietz, T. M. McClure, N. R. Jones, J. B. Russell, L. C. Russell, J. B. Lewis, Esther Halferty, Amelia A. Coffin, H. B. Illingworth, J. W. Lawler, Chas. Drake, J. E. Smeed, L. N. B. Carpenter, W. A. Rankin, Henry Klee, Mary W. Allen, all being residents, landowners and electors within the said Nampa-Meridian Irrigation District; and W. W. Briggs, Sarah E. Ash, Frank Martin, Chris Powell, Hester M. Sparkman, F. J. Garver, A. H. Eagleston & Sons, Ira Rohrer, A. F. Graves, E. C. Laughlin, Folsom & Martin, a co-partnership, A. R. Cruzen Investment Co., a corporation, A. Goreczky, Oliver O. Haga, Hunt & Sweet, a co-partnership, Chas. C. Tobias, R. F. Blucher, Samuel S. Drake, Mrs. E. A. Drake, Georgia T. Yates, Martin Houcke, all of said immediately above named persons being landowners in said irrigation district but not residents therein, but whose rights are identical with all of the above appearing named persons, and who will be affected by the proceedings in this cause, all being electors, taxpayers and residents of the State of Idaho, and owning approximately one-third of the irrigated land in said District, and for answer to the petition of H. B. Carpenter, E. H. Dewey and Daniel Barker, as the Board of Directors of the Nampa-Meridian Irrigaion District, admit, deny and allege as follows—

I.

Admit that H. B. Carpenter, E. H. Dewey and Daniel Barker constitute the duly elected, qualified and acting Board of Directors of said Nampa-Meridian Irrigation District.

II.

Admit that Nampa-Meridian Irrigation District is a duly organized irrigation district under and by virtue of the laws of the
77 State of Idaho, and was so organized on or about the 15th day of February, 1904, and that the proceedings for the organization of said district were examined, approved and confirmed by a decree of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, made on the 27th day of October, 1905, and entered on the 27th day of October, 1905, and duly recorded at Page 70 of Book "G" of Judgments in said Court, and that said decree ordered, adjudged and decreed that the said Nampa-Meridian Irrigation District was a duly organized irrigation District under and by virtue of the laws of the State of Idaho.

III.

Admit that said Nampa-Meridian Irrigation District on or about January 1, 1906, acquired what is known as the Ridenbaugh Canal System, which canal system diverts water from the Boise River in Ada County, Idaho, to the lands of said irrigation district, and that said canal system has sufficient capacity to furnish water to approxi-

mately 27,000 acres of land in said District. Deny the allegation in Paragraph III of said petition contained, that said canal system is of such capacity that it cannot furnish water for more than approximately 27,000 acres of land in said District. Deny the allegation in Paragraph III of said petition contained, that said lands on which said water supply is used are described in the proposed contract, thereafter referred to, as "Old Water Lands"; and in that connection allege the fact to be that said proposed contract, thereafter referred to, describes a part of said lands, upon which said water is used, as "Old Water Right Lands" and a Portion thereof as "Project Lands." Deny that there are approximately 44,060 acres of land in said District that are arid and require water for irrigation. Admit
78 that there are approximately 44,060 acres within said District which cannot be furnished with water by said District from its present supply and that said 44,060 acres of lands is referred to in said proposed contract as "Project Lands."

Admit that the United States has been engaged since the year 1904 in constructing an irrigation system known as the "Boise Project" on the bench lands on the south side of the Boise River in Ada and Canyon Counties in the State of Idaho, and that a part of said lands bound the Nampa-Meridian Irrigation District on the southerly side, and certain lands lying and being within said District, but deny that the said United States, at any time, or at all, contemplated the furnishing of water for 44,060 acres of said lands within said district: Admit that said proposed contract, referred to, refers to 44,060 acres of lands within said District as "Project Lands." Deny that the lands described in Paragraph III of said petition as 44,060 acres of dry lands and referred to in said Paragraph and the proposed contract as "Project Lands" and lying within the District, are a part of said Boise Project, and deny that said Boise Project is being constructed for the purpose of supplying water to said lands, with other lands. Admit that the lands included in the Nampa-Meridian Irrigation District are bench lands on the south side of the Boise River in said Counties of Ada and Canyon.

Admit that said "Old Water Right Lands" and said Boise Project lands are intermingled throughout the district, and that the United States has constructed its system of irrigation as alleged in Paragraph III and that portions of both of said classes of lands are now and for several years past have been supplied with water for irrigation through said system of laterals operated and managed by said Irrigation District for the said United States. As to the allegation that there are now, and were at all times in said petition men-
79 tioned several thousand acres of said project lands in said District still unpatented, these answering defendants have not sufficient information and belief to enable them to answer same and for *a*lck of information and belief deny the said allegation.

Admit that the said Boise Project is supplied with water through what is known as the New York Canal and that said canal is situated upon the higher lying bench lands of the said District. Deny that the lands lying between said canal and the said Nampa-Meridian Irrigation District are all lands of said Boise Project. Deny that all

of said lands are supplied with water from said canal. Admit that some of said lands are supplied with water from said canal, but in that connection allege that of the lands so furnished with water from said canal, only a small portion are lands of the Boise project of the United States. That as to the allegation that there is seepage water escaping from the said New York Canal and the distributing laterals of said project and surface waste water, resulting from irrigation, by said project, of the last described lands, alleged in said Paragraph III to be "Project lands," and underground seepage water resulting from such irrigation, and the allegation that such seepage, surface waste water and underground seepage water would or does move naturally in a northerly direction through and across the lands of the said Nampa-Meridian Irrigation District and have their drainage outlet in the Boise River, defendants have not sufficient information and belief to enable them to answer said allegations, and thereupon deny the same. That as to the allegation that as a result of the distribution of water for irrigation through said New York Canal and Ridenbaugh Canal and the use thereof for irrigation on lands
80 in said Boise Project and said District, large quantities of seepage water have accumulated on tracts of land in said Nampa-Meridian District so as to injure and swamp the same and threatens said land with destruction, defendants have not sufficient information and belief to enable them to answer said allegation, and thereupon deny the same. That as to the allegation in said Paragraph III of said petition, relative to the number of acres of Project and District Lands affected by said seepage waste and underground seepage water during the year 1913, defendants have not sufficient information and belief to enable them to answer the allegation, and thereupon deny the same.

Deny the conclusion in said Paragraph III contained that said affected area is constantly increasing, and that s said U. S. Reclamation Service engineers have made investigations and estimates showing that at the alleged present rate of increase, 6,449 acres of Old Water Right lands and 5,856 acres of Project Lands will be so affected by the year 1918, and that said lands and other lands of said District will be ruined and destroyed by seepage water unless a drainage system is constructed to protect the said lands from the said seepage water. Admit that it is not necessary to build more than one drainage system. That as to the allegation that the alleged seepage condition results from the use of water for irrigation from the Boise Project on the said Project Lands and upon the Old Water Right Lands of said District as a community, defendants have not sufficient information and belief to enable them to answer said allegation, and thereupon deny the same. Admit that said alleged condition does not result from either source. That as to the allegation that said alleged condition results jointly from the water seeping from said canals and each of them, and from the water escaping as
81 surface waste water and underground seepage water from all of the lands described in Paragraph III of said Petition, defendants have not sufficient information and belief to enable them to answer said allegation, and thereupon deny the same. But in

this connection defendants allege the fact to be that there are several thousand acres of land lying and being between the said New York Canal and the boundaries of the said Nampa-Meridian Irrigation District which are not a part of the Boise Project or of said District, and which said lands are supplied with water, for irrigation purposes, from appropriations from said Boise River made prior to the appropriations of the United States for the Boise Project, and over whose disposition of said irrigation water the said United States and the said District have no control; and these answering defendants further allege that between said New York Canal and the boundaries of said District and within said District Boundaries, private individuals and corporations are engaged in maintaining reservoirs varying in capacity from a few acre feet to several thousand acre feet, and over which the said United States and the said District have no control. Admit that the said proposed contract plans that a drainage system for the purpose of drainage of lands in said District be constructed, and that the expense thereof is to be borne jointly by the United States and the said Irrigation District. Admit that, by said contract, said drainage system as planned and estimated the total costs would be $557,000.00 and that said contract recites the proportions to be $291,000.00 to be borne by the United States and charged up to the Boise Project and $266,000.00 to be borne by the Irrigation District, and charged up to all of the Old Water Right Lands.

82 IV.

Admit that during the promotion of the Boise Project there was an organization purporting to be an organization of land owners within said proposed project, and that said organization was organized under and by virtue of the laws of the State of Idaho under its corporation laws. Deny that the members of said organization were confined to owners of land within the confines of the proposed project; but, in that connection, defendants are informed and believe, and therefore upon information and belief allege the fact to be, that a large percentage of the organizers of said corporation, which was denominated the Payette-Boise Water Users' Association, Ltd., were owners of land under other irrigation projects and persons having no interest whatever in said organization except the promotion of an enterprise that would put money in circulation in the community.

That as to the allegation that said organization was organized at the instance of the United States Reclamation Service for administration purposes and as a means whereby the said United States Reclamation Service might deal collectively with said land owners organized as a co-operative corporation, defendants have not sufficient information and belief to enable them to answer said allegation, and thereupon deny the same.

Deny that all land holders desiring water rights from said Boise Project were required to purchase stock in said corporation and to enter into contracts for securing water rights for their lands from said Boise Project; but in that connection allege the fact to be that

said corporation agreed, to and with each and every of the stockholders of said corporation, for a consideration to be levied
83 by a vote of the stockholders, to act as the agent of the stockholders to secure a water right at such time as the United States should have completed the proposed Boise Project so that water rights were available and the United States should have entered into a contract with the said corporation to furnish water rights to its stockholders; and that said stock, so subscribed for, was not to be paid for until all the conditions precedent in said stock subscriptions were complied with.

That as to the allegation that all of said contracts were of the same general character, and that the stock subscription contract attached to petition as Exhibit "C" is identical with all of the stock subscription contracts of said corporation, and that all of the stock subscription contracts of said corporation were duly recorded in the Recorder's office of the County wherein the land affected thereby was situated, defendants have not sufficient information and belief to enable them to answer said allegations, and thereupon deny the same, but, in this connection allege the fact to be that a portion of said stock subscription contracts were recorded between one and a half to three years after the same were entered into, and subsequent to transfer of the lands of the subscriber to innocent third persons without notice thereof, and of the balance of said stock subscriptions a large portion thereof have never been recorded.

Deny that the water rights distributed by the Ridenbaugh Canal System are not full season rights, but admit that said water rights are subject to cut, as to quantity, in the latter part of the irrigating season when the water supply of the Boise River is diminished, particularly in dry seasons.

Admit that during the years 1905, 1906 and 1907, a large
84 number of land owners in said District receiving water from said Ridenbaugh Canal System entered into agreements of the character as set forth in Exhibit "C," but deny that said land owners entered into said agreements and stock subscription for the purpose of securing a supplemental supply of stored water from the Boise Project for use on their said lands during the period of low water. Admit that at that time it was uncertain and doubtful whether or not the stored water would be needed to supplement said water rights from said Ridenbaugh system. Admit that a large number of said land holders so entering into said stock subscription contracts, as aforesaid, have now reached the conclusion that such stored water is not necessary for the irrigation of their said lands. As to whether or not said stock subscribers of the Payette-Boise Water Users' Association, Ltd., within said District, are desirous of being released from said contracts, these answering defendants are not sufficiently informed, and for lack of information and belief relative thereto deny the same.

Admit that by said proposed contract, attached to said petition marked Exhibit "B" said stock subscription contracts were to — cancelled and released and the land owners of said District allowed

to purchase stored water from the United States in the amount of 828 acre feet of stored water at the agreed price of $24,840.00.

V.

Admit that there are within the boundaries of said District 44,060 acres of land which the said District is unable to supply with water for irrigation from the water rights now owned by the District; deny that there are 44,060 acres of land within said District which said District is unable to water from the canals of the District.

85 Admit that said lands are referred to in said proposed contract as "Project Lands" of the District. Admit that said lands require water for the production of some crops, but deny that crops cannot be produced on said lands without irrigation; deny that said lands are all arid in character, but in that connection allege the fact to be that a large portion of said lands are in a high state of cultivation and have been for years. Deny that the said Boise Project has been constructed for the purpose of supplying said lands with water; but in that connection allege the fact to be that the said Boise Project was constructed to furnish water to the dry lands within said District, not already furnished with water, except such lands as cannot be subjected to the lien of the United States for construction charges, such as State Lands.

Admit that by the terms of the proposed contract the United States offers to sell to the said District water rights for said 44,060 acres of land, upon terms named therein but deny that said terms, so named, are satisfactory to the District, and to the users of water of said District.

VI.

Admit all of the allegations in Paragraph VI, VII, VIII, IX, X, XI, XII, and XIII of said petition contained.

VII.

Admit that upon a canvass of the votes received at said election it was shown that 1206 votes were cast in favor of "Contract-Yes" and 160 votes were against said contract, and that more than two-thirds of said votes were cast for "Contract-Yes," but deny that by reason of such vote the question so submitted was duly carried and that the Board was authorized to execute said contract between the United States of America and the Nampa-Meridian Irrigation District as alleged.

86 VIII.

Admit the allegations in Par. XV. of said petition contained.

IX.

Admit that the Payette-Boise Users Association, Ltd., is a corporation duly organized and existing under and by virtue of the

laws of the State of Idaho; admit that during the years 1905, 1906, a large number of the land owners within the Nampa-Meridian Irrigation District signed stock subscription contracts with said corporation, but deny that said stock subscription contracts, with said Idaho corporation, provided for the payment of their proportionate shares of the cost of the construction of the Payette-Boise Project to be constructed by the Government under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388) known as the Reclamation Act. Admit that at the time said land owners signed said above mentioned stock subscription contracts it was agreed between said subscribers and the said Payette-Boise Water Users' Association, Ltd., that a credit of $14.00 per acre could be allowed to such land owners in the said District on account of the value of existing works and rights of said District, and that said credit was as an off-set to the charge of said corporation for said stock, so subscribed for; deny that said credit was agreed to be an off-set against the charges of the Payette-Boise Project. As to the allegation in Paragraph XVI of said petition contained, that on account of the change of plans of the Payette-Boise Project and the increas- of the public cost of water rights it was found that the credit of $14.00 per acre for existing works of the District was to small to be equitable and fair, these answering defendants have not sufficient information or
87 belief to enable them to intelligently answer the same and for lack of such information and belief deny said allegation.

Deny that said proposed contract has been proposed for the purpose of properly adjusting matters between the said Payette-Boise Water Users' Association, Ltd., and the United States, which furnished the money to construct the works of the Payette-Boise Project, and to increase the water supply of said District, and deny that said proposed contract was proposed for the purpose of relieving the overwet lands within said District.

X.

Deny that under the proposed contract the Nampa-Meridian Irrigation District will secure and furnish sufficient water to the lands of the District which were heretofore signed up in the Payette-Boise Water Users' Association, Ltd.; deny that it necessarily follows that it will be no longer necessary that these lands should individually contract for water from the Government. Admit that the Board of Directors of the Payette-Boise Water Users' Association, Ltd., have heretofore duly passed a resolution approving said proposed contract between the United States of America and the Nampa-Meridian Irrigation District, in principle and general form.

XI.

Admit that the Secretary of the Interior of the United States has approved the proposed contract with the Nampa-Meridian Irrigation District as to form. As to the allegation that the said Secretary of the Interior of the United States is ready to execute the same and

proceed with the construction of the proposed work as soon as the legality and validity of the proposed contract with the Government has been affirmed by the Court, these answering defendants
88 have not sufficient information and belief upon which to answer same, and therefore for lack of such information and belief, deny said allegation.

XII.

Admit that the Arrowrock Reservoir and the Boise Project and all the works to be constructed by the Government in connection therewith are being constructed primarily for the reclamation of the public lands of the United States, of which there are many thousand of acres to be reclaimed by said works. Admit that it is desirable in order to avoid making the cost of public lands unreasonable and excessive that the private lands intermingled with and adjoining the public lands of said project should also be included and be reclaimed and bear a share of the costs, but deny that it is necessary that said private lands should also be included and be reclaimed and bear a share of said costs, and especially deny that lands already supplied with water should be included and be reclaimed again in order to reduce the expense of reclaiming public lands.

And for other and further answer defendants allege and state:

I.

That many of your answering defendants have acquired water rights for the use of their respective lands independently of the water rights furnished by the District, as owned and controlled and distributed by the District, and are not in need of water rights proposed to be furnished under the terms of said contract between said District and the Government of the United States; and many of your answering defendants, under the terms of said contract, will be compelled to pay the assessment of $75.00 per acre for said water rights under the terms of said contract, without benefit to your said an-
89 swering defendants, in that they have a sufficient water right from independent sources for said lands as aforesaid. That many of your answering defendants own lands for which it is proposed under the terms of said contract to purchase water in excess of 160 acres, that under the terms of said contract many of your answering defendants will suffer damages for each and every acre of their respective said lands in the amount of $75.00 per acre as approximated under the terms of said contract for all lands owned by defendants in excess of 160 acres, as under the terms of said contract defendants will be limited in their rights to receive water for said lands in amount only sufficient for 160 acres.

II.

That for the purpose of particularizing with respect to said classes of land above referred to, one of your answering defendants, Oliver

O. Haga, respectfully submits that he is the owner of the Southeast quarter of Section 21, and the West Half of the Southwest Quarter of Section 22, Township 3 No., Range 1 East B. M., Ada County, Idaho; that said land lies within the boundary lines of said District; that said Oliver O. Haga obtains water from said Irrigation District for 80 acres only of said land, and that he and his predecessor in interest, at great expense, have acquired an independent water right for the remaining 240 acres of said land, and if the said Oliver O. Haga is compelled to purchase or permit to be purchased, or if the said irrigation District purchases a water right under the terms of said contract at approximately $75.00 per acre, the terms named in said contract, he will suffer damages at approximately $75.00 per acre for each and every acre of said 240 acres for which it is proposed under the terms of said contract to purchase water rights, which said water rights are not necessary to the use and benefit of said
90 land, *said land* and the water rights of said Oliver O. Haga, as now owned by him as aforesaid, for said 240 acres of land, will be rendered valueless, and the said Oliver O. Haga, together with other of your answering defendants occupying the same relative position with respect to water rights independently acquired, as aforesaid, will be deprived of their said property without due process of law, in violation of Section 13, Art. 1 of the Constitution of the State of Idaho, and of the Fourteenth Amendment of the Constitution of the United States, and of Section 14, of Art. 1. of the Constitution of the State of Idaho, in that said rights of said Oliver O. Haga and your other answering defendants who are similarly situated with respect to independent water rights acquired as aforesaid, have not been taken or acquired under Sec. 14, Art. 1 of the Constitution of the State of Idaho, and the said answering defendants have received no compensation for said loss of said rights which said rights under said contract will be destroyed and rendered valueless, and will be compelled to pay approximately $75.00 per acre for water rights for all their said lands respectively, in excess of sufficient water for 160 acres of land, and will be thus deprived of their said property without due process of law, in violations of Sections 13 and 14 of Art. 1 of the Constitution of the State of Idaho and of the Fourteenth Amendment of the Constitution of the United States of America.

III.

That many of your answering defendants own lands within said District which have valuable rights from sub-irrigation and upon which valuable wells have been dug, and upon which wells your answering defendants rely for a water supply, all of which wells and benefits from sub-irrigation, if said drainage ditches as
91 proposed under the terms of said contract are built, will be destroyed, to the great damage and injury of your answering defendants. That many of your answering defendants, or their predecessors in interest acquired the respective lands and water rights therefor owned by them, prior to the adoption of the Constitution of the State of Idaho and prior to the adoption by the Legislature of

the State of Idaho of Title 14 of the Revised Codes of Idaho, known as the irrigation District Law, or Wright Act, and the amendments thereto.

VI.

That the authority for entering into said contract and under which said irrigation district proposes to enter into said contract, is based upon Title 14 of the Revised Codes of the State of Idaho, and all amendments thereunder, and of the Act of Congress of the United States of June 17, 1902, known as the Reclamation Act, and acts amendatory thereof and supplemental thereto, and the Act of Congress of February 21, 1911, known as the Warren Act. That under said Statutes of the State of Idaho as aforesaid, or any other statute or law of the State of Idaho, said irrigation district is without authority to enter into said contract, and for that reason said acts, doings and proceedings of said District as aforesaid and the entering into said contract for said water rights and drainage, under said Statutes of the State of Idaho, will deprive your answering defendants of their respective rights and property as aforesaid, and in violation of said provisions of the constitution of the United States and of the State of Idaho, as aforesaid, and in violation of Section 10 of Art. 1 of the Constitution of the United States.

V.

That neither said Secretary of the Interior nor the United
92 States of America have any authority whatsoever under said Reclamation Act and the Amendments thereto, or of said Warren Act as aforesaid, or any other law or enactment of the Congress of the United States to enter into said contract.

VI.

That many of your answering defendants are holders of contracts under said Payette-Boise Water Users' Association, Ltd., that it is proposed under the terms of said contract to cancel, release and annul the rights of your answering defendants under said contract with said Payette-Boise Water Users' Association, Ltd., without said Payette-Boise Water Users' Association, Ltd., the representative of your answering defendants with respect to said rights having been served with process as required by law, and that such cancellation and annulment of said contractual rights of your answering defendants in said Payette-Boise Water Users Association, Ltd., without said Payette-Boise Water Users Association, Ltd., being summonsed into this Court, is a deprivation of *of* said rights of your answering defendants and said Payette-Boise Water Users Association without due process of Law, in violation of Section 13 of Art. 1 of the Constitution of the State of Idaho and of the Fourteenth Amendment of the Constitution of the United States of America.

VII.

That this Court is without jurisdiction of the person of the Secretary of the Interior of the United States of America, and is without jurisdiction of the subject matter involved in this proceeding.

VIII.

That said proposed contract is unconscio*us*able in its terms, in that under the terms of said contract said contract for a
93 water right and for the cost of drainage thereunder is made a first mortgage lien in behalf of the Government of the United States and includes the provision that in case any of the payments shall not be made when due under the terms of said contract, that the Government of the United States shall not be compelled to deliver water to any user of water while in default of said payment; and for the further reason that said contract contains the provision that the District "will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge."

Cross-complaint.

For cause of action by way of cross-complaint, cross-complainants allege and state.

I.

That all times herein mentioned the Nampa-Meridian Irrigation District is and was at all times herein mentioned a duly organized irrigation district under and by virtue of the laws of the State of Idaho.

II.

That the said Irrigation District proposes to enter into that certain contract by and between the said irrigation district and the Government of the United States marked Exhibit "B" to plaintiff's complaint, on file herein, to which reference is hereby made, and by such reference said contract is made a part of this cross-complaint as fully as if incorporated herein.

III.

That Payette-Boise Water Users Association, Ltd., is and was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Idaho.

94

IV.

The cross-complainants refer to Paragraphs I to VIII inclusive of their affirmative defense herein, and by such reference, and *by such*

reference make said paragraphs a part of their cross-complaint herein as fully as if incorporated in said cross-complaint.

V.

That your cross-complainants are informed and believe that said Nampa-Meridian Irrigation District and said Government of the United States of America will execute said contract, and that said Government of the United States of America will proceed to dig the drainage ditches proposed in said contract, and that said Nampa-Meridian Irrigation District will proceed to assess the lands of cross-complainants herein as aforesaid under the terms of said contract, unless restrained and enjoined by order of this Court from so doing, and upon such information and belief allege the fact to be that said Nampa-Meridian Irrigation District and the Government of the United States, and said Secretary of the Interior will execute said contract, and that said Government of the United States will dig said drainage ditches as provided in said contract, and that said Nampa-Meridian Irrigation District, will levy the assessment provided for in said contract as aforesaid, all to the great damage and irreparable injury of cross-complainants herein.

VI.

That cross-complainants are without a plain, speedy and adequate remedy at law.

Wherefore your answering defendants and cross-complainants pray the judgment of the Court as follows:

95 (*a*) That said petitioners take nothing by their action, and that your answering defendants and cross-complainants be dismissed with their costs in this behalf expended.

(*b*) That said petitioners be restrained and enjoined from entering into said contract, and restrained and enjoined from levying said proposed assessments, under the terms of said contract, and for such other and further relief as to the Court may seem just in the premises.

J. B. ELDRIDGE,
FLOYD C. WHITE,
Per J. B. E.,
Attorneys for Defendants and Cross-Complainants.

Residence, Boise, Idaho.

Duly verified.
May 1, 1915, filed.

96 (Title of Court and Cause.)

Answer of Petitioners to the Cross-complaint of Jas. G. Petrie et al.

For answer to the cross-complaint of the defendant, Jas. G. Petrie et al., petitioners say:

1. For answer to Paragraph I of the affirmative defense embodied in Part 4 of the cross-complaint, petitioners allege that the defendants will have to pay only such assessments as are lawfully made by the Nampa-Meridian Irrigation District against the lands of defendants; that upon the making of said assessments, petitioners will, as required by law, bring an action in this court for the confirmation thereof at which time defendants and each of them will have an opportunity to contest the same; that this Court has no jurisdiction to pass upon said assessments in this action; that said defendants and neither of them will be compelled to pay any assessments whatever without benefit therefor, either for the reason that defendants have sufficient water rights from independent sources for their lands or from any other cause. Petitioners deny that many of the answering defendants or any of them own lands for which it is proposed under the terms of the proposed contract to purchase water in excess of 160 acres; and deny that under the terms of said contract any of the defendants will suffer damages in the amount of $75 per acre or in any sum at all for any reasons whatsoever.

2. For answer to Par. 2 of the affirmative defense embodied in cross-complaint, deny that the said Oliver O. Haga will be injured in any amount whatever if the irrigation district purchases a water right under the terms of said contract, deny that the lands of the said defendant, or any defendant will be rendered value-
97 & 98 less by said purchase; deny that in said event said defendant or any of the defendants will be deprived of any property right whatever, whether under the Constitution of the State of Idaho or under the Constitution of the United States.

3. Further answering the allegation of said cross-complaint, petitioners deny that the construction of the proposed drainage ditches by the Irrigation District will in any manner or at all injure the wells or rights of irrigation by sub-irrigation of the said defendants or any of them; petitioners allege that the construction of the proposed drainage ditches will greatly benefit the lands of the said defendants and each of them. Petitioners deny that the said irrigation district is without authority to enter into said contract and deny that the full and complete performance of said contract will injure the said defendants or either of them or injure the property rights of said defendants or either of them and deny that the entering into of said contract or the performance thereof by the said irrigation district will deprive any of the said defendants of any of their rights or property without due process of law or at all.

4. Petitioners allege that the said cross-complaint fails to state a cause of action since the court has no jurisdiction in this proceeding to consider any of the matters alleged therein and the said

defendants and each of them will have ample opportunity to contest the assessment of benefits made by said Irrigation District against their land. Wherefore petitioners pray that said cross-complaint be dismissed.

HUGH E. McELROY,
Attorney for Petitioners,
Residing at Boise, Idaho.

Duly verified.
Filed May 5, 1915.

* * * * * * *

99 (Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

In this cause the petition of the Board of Directors of the Nampa-Meridian Irrigation District having been filed on the — day of February, 1915, and upon the filing of said petition, the Judge of this Court duly fixed March 22, 1915 at ten o'clock A. M. of said day, at the Court House, in the Court Room of this Court, at Caldwell, Canyon County Idaho, as the time for the hearing of said petition, and duly made an order directing the Clerk of this Court to give and publish a notice of the filing of said petition and the Court on examination finds that said notice was duly given by said Clerk and published in the Nampa Leader-Herald, a newspaper printed and published in Nampa, Canyon County, State of Idaho the same being within the boundaries of the said Nampa and Meridian Irrigation District, for four successive weeks prior to the date of said hearing. That said notice, so given and published, stated that the hearing of said petition was set for the 22nd day of March, 1915 at ten o'clock A. M. of said day at the Court House in the City of Caldwell, Canyon County, Idaho. Said notice further stated the prayer of said petition and that any person interested in the subject matter of said petition might, on or before the date set for the hearing thereof, demur to or answer said petition. Proof of the giving of said order and publication of said notice was duly made to the Court and filed in this action:

Whereupon James G. Petrie et al. appeared as defendants herein by J. B. Eldridge and Floyd C. White, their attorneys, and filed a demurrer to the petition herein, demurrer was duly heard
100 and considered and by the Court denied; whereupon the said defendants filed their answer and cross-complaint in this action and the petitioners filed their answer thereto; whereupon this cause came on regularly for trial on the 6th day of May, 1915, before the Court without a jury, a jury trial having been waived by all the parties and the default of each and every person interested in the subject matter of said petition other than the answering defendants herein, having been duly entered, the petitioners appearing by Hugh E. McElroy and B. E. Stoutmeyer, their attorneys, and the said answering defendants appearing by J. B. Eldridge and Floyd C. White, their attorneys;

Whereupon the Court heard the testimony on behalf of the respective parties and the argument of counsel in relation thereto, and the Court finds the facts as follows:

1. The court finds that at all times mentioned herein H. B. Carpenter, E. H. Dewey and Daniel Barker constituted the duly elected, qualified and acting Board of Directors of the said Nampa and Meridian Irrigation District.

2. That the Nampa & Meridian Irrigation District is a duly organized irrigation district under and by virtue of the laws of the State of Idaho, and that the proceedings for the organization of the said irrigation district with other matters were examined, approved and confirmed by a decree of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, made and entered on the 27th day of October, 1905, and duly recorded at page 70 of Book "G" of Judgments in said Court, which said decree ordered, adjudged and decreed that the said Nampa & Meridian*d* Irrigation District is a duly organized irrigation*s* district under and by virtue of the laws of the State of Idaho, which
101 said decree is hereby referred to and by reference made a part hereof.

III.

That said Nampa and Meridian Irrigation District on or about the first day of January, 1906, acquired what is known as the Ridenbaugh Canal System, which canal system diverts water from the Boise River in Ada County, Idaho, to the lands of said irrigation district, and that said canal system has sufficient capacity to furnish water to approximately 27,000 acres of land in said district and no more. That said lands on which said water supply is used are described in the proposed contract hereinafter referred to as "Old Water Right" lands. That the said irrigation district has never acquired any other or additional water rights for the irrigation of lands within said district. That approximately 44,060 acres of land in said district are arid and require water for irrigation, and cannot be furnished with water by said District from the present supply, said lands being referred to in the proposed contract as "Project Lands."

That the United States has been engaged since the year 1904 in constructing an irrigation system known as the Boise project on the bench lands on the south side of the Boise River in Ada and Canyon Counties in the State of Idaho, a part of said lands bounding Nampa & Meridian Irrigation District, being the lands hereinbefore referred to as "Project lands" lying within said district. That the lands included in the Nampa & Meridian Irrigation District are bench lands on the south side of Boise River in said Counties of Ada and Canyon. That the lands above described as project lands lying in said District are a part of the lands of the Boise Project and
102 said Boise Project is being constructed for the purpose of supplying water to the same, with other lands.

That said "Old Water Right Lands" and said "Project Lands"

are intermingled together throughout said district and that several thousand acres of said Project Lands were at all times herein mentioned and still are unpatented lands of the United States. That the economical irrigation of said lands requires that water should be distributed to them through joint and not by separate systems of canals for distribution. That the United States through the said Reclamation Service has constructed such a distributing system jointly with the distributing system of the said District and that portions of both said classes of lands are now and for several years past have been supplied with water for irrigation through said joint system of laterals operated and managed by said irrigation district under an agreement therefor with the said Reclamation Service of the United States. That said Boise Project is supplied with water through what is known as the New York Canal which is the high line canal of said project and that said canal is situated upon the higher lying bench lands that the lands of said district and the land lying between said New York Canal and the said Nampa & Meridian Irrigation District are lands of the said Boise Project and are supplied with water from the said New York Canal as the main distributing lateral of said project. That the seepage water escaping from said New York Canal and the distributing laterals of the said Boise Project together with the surface waste water resulting from the irrigation of the last described lands of said project and the underground seepage water resulting from such irrigation, naturally move in a northerly direction through and across the
103 lands of the Nampa-Meridian Irrigation District and have their drainage outlet in Boise River. That as a result of the distribution of water for irrigation through said New York Canal and through said Ridenbaugh Canal and the use thereof for irrigation on lands in said Boise Project and in said District, large quantities of seepage water have accumulated on tracts of land in said Nampa & Meridian Irrigation District so as to injure and swamp the same and threaten said lands with destruction; that approximately 2796 acres of the class hereinbefore designated as "Old Water Right" lands of said District and approximately 1784 acres designated as "Project" lands of said District were so affected in Nov. 1913. That the area so affected is constantly increasing and said U. S. Reclamation Service through its engineers has made investigations and estimates showing that at the present rate of increase 6449 acres of old water right lands and 5856 acres of project lands will be so affected by the year 1918, and that said lands and other lands of said district will be ruined and destroyed by seepage water unless a drainage system is constructed to protect said lands from said seepage water. That it is not necessary for such purpose to build more than a single drainage system. That said seepage conditions result from the use of water for irrigation from Boise Project and upon said project lands and upon the "Old water right" lands of said District as a community and does not result entirely from either source, but result jointly from the water seeping from said canals and each of them and from the water escaping as surface waste water and underground seepage water from all of the above

described lands. That by the provisions of said proposed contract,
hereinafter mentioned, the said parties thereto propose the
103a construction of a suitable drainage system for the purposes
hereinbefore mentioned, the expense thereof to be borne jointly by the United States and the said Irrigation District. That the total cost of said drainage system as planned and estimated by the United States Reclamation service is the sum of $557,000.00 and after careful negotiation between the officers of the said Reclamation Service and the officers of said Irrigation District, and investigation by the engineers of the United States Reclamation Service and of said District, said parties have jointly concluded that the sum of $291,000.00 of said expense should be borne by the United States and $266,000. should be borne by the said Irrigation District, and they propose by said contract to jointly bear said expense in said proportion.

IV.

That when the said Boise Project was first promoted, the land owners owning land in said project organized the certain corporation known as the Payette-Boise Water Users' Association, Ltd. That said corporation was organized at the instance of the United States Reclamation Service for administration purposes and as a means whereby the said United States Reclamation Service might deal collectively with said land owners organized as a co-operative corporation. That all land owners desiring water rights from said Boise Project were required to purchase stock in said corporation and to enter into contracts for securing water rights for their lands from said Boise Project. That said contracts were all of the same general character, a copy of which is to the amended complaint attached as Exhibit "C" and were duly recorded in the Recorder's office of the County wherein the land affected thereby was situated. That the
water rights distributed by the said District from said Riden-
104 baugh Canal System are not full season rights but are subject to cut in the latter part of the season when the water supply of Boise River is diminishing, particularly in dry seasons. That during the years 1905, 1906 and 1907 a large number of land owners in said District receiving water from said Ridenbaugh canal system entered into agreements of the character above mentioned for the purpose of securing a supplemental water supply of stored water from the Boise Project for use on their said lands during the period of low water. That at such time it was uncertain and doubtful whether stored water was needed to supplement said water rights from the said Ridenbaugh System. That a large number of said land owners contracting for said stored water have now reached the conclusion that such stored water is not necessary for the irrigation of their said lands and are desirous of being released from their said contracts. That by the proposed contract hereto attached as Exhibit "B" the said parties agree to cancel and release said contracts for stored water and to permit land owners to purchase from the United States such amounts of stored water through said dis-

trict as have been applied for by the said land owners and no more, the same amounting approximately to 828 acre feet, costing $24,840.

V.

That there are within the boundaries of the said Nampa & Meridian Irrigation District 44,060 acres of land which the said District is unable to supply with water for irrigation from the canals and water rights now owned by the district, being the lands herein referred to as the "project" lands of the district. The said lands are arid in character and require water for irrigation in order to produce crops. That the said Boise Project has been constructed for the
105 purpose of supplying said lands with water. That by the terms of the proposed contract, the United States offers to sell to the district water rights for said lands, upon terms named in said contract and which are satisfactory to the district.

VI.

That on or about the 25th day of August, 1914, the Board of Directors of the said Nampa and Meridian District by a resolution entered upon its records formulated a general plan for drainage and the acquirement of storage water rights and other rights for the lands of the District, which plan provided that the said district should enter into a contract with the United States for the securing of said water rights and the construction of said drainage works which plan stated water works and other property the District proposed to purchase and the cost of purchasing the same. A copy of said resolution is attached to the amended complaint herein marked Exhibit "A" and a copy of said contract with the United States is also attached to the said Amended Complaint as Exhibit "B."

That at said time there was submitted by the United States of America a proposed contract for supplying full season water rights for the use of said lands lying within said irrigation district from the Boise Project of the U. S. Reclamation Service, to the amount and value of $3,304,500 and also for supplying stored water from Arrow Rock Reservoir of the said Boise Project with which to supplement the water rights of said Irrigation District to the amount and value of $24,840 and also for expending $266,000 to be repaid by the district for the benefit of said Irrigation district in draining the over-wet lands of the District in conjunction with and as a part of the drainage plans of *plans of* the United States of
106 America, in providing proper drainage for the lands lying under the said Boise Project supplied and to be supplied with water for irrigation from said project, which resolution included said proposed contract and was based upon surveys, examinations, maps, plans and estimates made by the engineers of the U. S. Reclamation Service, furnished and supplied to the Board of Directors of said Irrigation District and adopted as a part of said plan. A copy of which contract is attached to amended complaint as Exhibit "B."

VIII.

That prior to the 25th day of August, 1914 and for the purpose of ascertaining the cost of that part of the proposed plan relating to the acquirement of water rights from the Boise Project of the U. S. Reclamation Service, one F. E. Weymouth as supervising engineer of the U. S. Reclamation Service, made such surveys, examination and plans as demonstrated the practicability of such plans and furnished the proper basis for the estimate of the cost of the carrying out of the same; and that such surveys, examinations, maps plans and estimates were adopted by the District as a part of said plan, a copy thereof being attached to the amended complaint as Exhibit "D" and were certified to said District by said F. E. Weymouth; and that at such time the said F. E. Weymouth was a competent irrigation engineer. That prior to the 25th day of August, 1914, and for the purpose of ascertaining the cost of that part of the proposed plan known as the Drainage system provided for as hereinbefore alleged, one J. L. Burkholder, as engineer of the Reclamation Service of the United States has duly made surveys, examinations,
maps, plans and estimates to demonstrate the practicability
107 of such plan and furnish the proper basis for an estimate of
the cost of carrying out of the same; that said surveys, examinations, maps, plans and estimates were adopted by said Board as a part of said plan; that said J. L. Burkholder was a competent irrigation engineer and said surveys, examinations, maps, plans and estimates were certified by him to said Board a copy thereof being attached to the amended complaint as Exhibit "E." That prior to the 25th day of August, 1914, said district employed one F. C. Horn a competent irrigation engineer, and the said F. C. Horn carefully examined said surveys, examinations, maps, plans and estimates and certified, as engineer for the District that they demonstrated the practicability of such plans and furnished the proper basis for the estimate of the cost of carrying out the same, and said F. C. Horn at such time approved the estimates of the cost hereinbefore mentioned.

IX.

That in pursuance of the aforesaid resolution the Secretary of the said District conveyed to the State Engineer of the State of Idaho at Boise, Idaho, copies of said maps, plans, estimates, surveys and examinations for an examination and report, as provided by law.

X.

That on or about the 2nd day of September, 1914, the State engineer of the State of Idaho made and submitted to said Board of Directors a written report upon the said surveys, examinations, maps, plans and estimates referred to him by said Board as aforesaid, and that said State Engineer in his report approved the plan of said Board.

XI.

That upon receiving said report of the State Engineer of
108 the State of Idaho said Board of Directors did, on or about the 3d day of September, 1914, determine that for the purpose of carrying out said plan the sum of $24,840 was necessary to be raised to purchase the required amount of storage water from said Arrow Rock Reservoir, and that the sum of $3,304,500 was necessary to be raised to purchase the required amount of season water for said lands from the Boise Project of the Reclamation Service of the United States and that the sum of $266,000 was the amount of money necessary to be raised to construct the part of said drainage properly chargeable to said District; that at such time said Board duly adopted a resolution determining that said amounts of money were necessary to be raised and calling a special election of said District to be held on the 10th day of October, 1914, at which election there should be submitted to the electors of the district the question whether the District should be authorized to contract with the United States of America through the Secretary of the Interior for an interest in the Arrow Rock Reservoir to the amount of $24,840 for storage purposes and for the construction of drainage ditches within said District at the expense of $266,000 and for the purchase of a water right from the Boise Project of the U. S. Reclamation Service for the Irrigation of 44,060 acres at a cost of $3,304,500 as provided in said contract.

XII.

That notice of said election was duly given by posting notices thereof in three public places in each of the election precincts of said election district on the 5th day of September, 1914 and at least four weeks prior to said election, and also by publishing said notice
in the Nampa Leader-Herald, a newspaper published in
109 Nampa, Canyon County Idaho, where the office of said Board is located and within the boundaries of said District, and also in the Meridian Times, a newspaper published at Meridian, Ada County, Idaho, within the boundaries of said precinct, once a week for five successive weeks before election; and that said notice specified the time and places of said election, and the purposes for which said election was being held, the amount of bonds proposed to be issued, and stated that the report of the State Engineer and copies of the maps and estimates were on file and open to public inspection by the people of the District at the office of said Board in Nampa, Idaho, and at the office of the State engineer in the State Capital at Boise, Idaho; that said notice further specified that the electors should cast ballots at said election which should contain the words "Contract—Yes" or "Contract—No."

XIII.

That on the 10th day of October, 1914, such special election was held, after due notice thereof had been given as aforesaid, and at

said election 1206 votes were cast for "Contract—Yes" and 160 votes were cast for "Contract—No."

XIV.

That on the 12th day of October, 1914, said Board met to canvass the returns of such special election and the returns from all the election precincts having been received the same were duly canvassed by the said Board, and on said canvass of said returns it was found that 1206 votes were cast in favor of "Contract—Yes" and 160 votes were against said contract, being for "Contract—No;" that the Board thereupon duly declared that more than two-thirds of the votes having been cast for "Contract—Yes" the question so submitted was duly carried, and the Board was authorized to
110 execute said contract between the United States of America and the Nampa & Meridian Irrigation District for an interest in the Arrow Rock Reservoir in the amount of $24,800, and for an interest in the Boise Project of the U. S. Reclamation Service in the amount of $3,304,500, and for drainage in the amount of $266,000 as provided in the said contract on which said election was called.

XV.

That on the 2nd day of February, 1915, said Board of Directors passed the following resolution:

"It is for the best interests of said District that each and all of the proceedings for the authorization of the execution of the contract with the United States of America embodied in the plan of this Board for drainage and the purchase of water rights from the United States of America, adopted on the 25th day of August, 1914, and authorized by the election held by the district on the 10th day of October 1914, thus far taken, be judicially examined, approved and confirmed, and the attorney for the district is hereby notified and directed to proceed to file a petition for that purpose."

XVI.

That the Payette-Boise Water Users Association, Ltd., is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho; that during the years 1905, and 1906 a large number of the land owners within the Nampa and Meridian Irrigation District signed stock subscription contracts with the said corporation known as the Payette-Boise Water Users Association Ltd., providing for the payment of their proportionate shares of the cost of the construction of the Payette-Boise Project to be con-
111 structed by the Government under the provisions of the Act of Congress of June 17, 1912 (32 Stat. 388) known as the Reclamation Act; that at the time the land owners signed the above mentioned contracts for water stock in said corporation it was agreed that a credit of $14.00 per acre should be allowed to such land owners in the Nampa and Meridian Irrigation District on account

of the value of existing works and rights of the district for said credit to be allowed as a partial off-set against the charge of the Payette-Boise Project; that on account of the changes in the plans of the Payette-Boise Project and the increase in the public cost of water rights it was found that the credit of $14.00 per acre which would be allowed to the said lands of the Nampa and Meridian Irrigation District for its existing works and rights was too small to be equitable and fair; that said contract has been proposed for the purpose of properly adjusting the matters between the said Payette-Boise Water Users Association Ltd., and the United States which furnished the money to construct the works of the Payette-Boise Project and to increase the water supply of said District and relieve the over-wet lands within the district.

XVII.

That under the proposed plan adopted by the Board of Directors of the Nampa and Meridian Irrigation District, a part of which plan is the proposed contract between the United States of America and the Nampa and Meridian Irrigation District, together with the water rights acquired by appropriation, the Nampa and Meridian Irrigation District will secure and furnish sufficient water to the lands of the District which were heretofore signed up in the Payette-Boise Water Users Association, Ltd., and therefore it will
112 be no longer necessary that these lands should individually contract for water from the government; that the Board of Directors of the Payette-Boise Water Users Association, Ltd. have heretofore duly passed a resolution approving said proposed contract between the United States of America and the Nampa and Meridian Irrigation District, in principle and general form.

XVIII.

That the Secretary of the Interior of the United States has approved the proposed contract with the Nampa and Meridian Irrigation District as to form and is ready to execute the same and proceed with the construction of the proposed work as soon as the legality and validity of the proposed contract with the Government has been affirmed by the Court.

XIX.

That the aforesaid Arrow Rock Reservoir and the Boise Project and all the works to be constructed by the Government in connection therewith are being constructed primarily for the reclamation of the public lands of the United States of which there are many thousands of acres to be reclaimed by said works, but it is necessary and desirable in order to avoid making the cost of public lands unreasonable and excessive that the private lands intermingled with and adjoining the lands of the said project should also be included and be reclaimed and bear a share of the costs.

Conclusions of Law.

1. As conclusions from the foregoing facts the Court finds; That said contract has been duly authorized by the qualified electors of the Nampa and Meridian Irrigation District, and that the Board of Directors of the said Nampa and Meridian Irriga-
113 tion District are duly authorized to execute said contract.

2. That the said Payette-Boise Water Users Association, ltd., have the power to executed said contract with the said Nampa & Meridian Irrigation District.

3. That the United States of America has the power to execute said contract with the Nampa and Meridian Irrigation District; and that when said contract is executed it is a legal and valid contract and binding upon the parties hereto.

It is hereby ordered that judgment may be entered accordingly.

ED. L. BRYAN, *Judge.*

Dated May 20, 1915.
Filed May 20, 1915.

114 (Title of the Court and Cause.)

Judgment.

This cause coming on regularly to be heard the 6th day of May, 1915, upon the petition of plaintiffs taken as confessed by each and all of the parties interested in the subject matter of said petition, except James G. Petrie et al, answering defendants, and the default of all of the said parties, except James G. Petrie et al, having been duly entered by the Clerk of the Court, this cause was duly tried by the Court without a jury.

Whereupon the petitioners offered oral and documentary evidence to sustain the allegations of the petition and the defendants, James G. Petrie et al offered testimony in support of the answer and cross-petition of said defendants and the evidence being closed, the cause was submitted to the Court for consideration and decision and after due consideration thereof the Court finds that each and all of the allegations of the petition are sustained by the proof and makes and files its finding and decision in writing and orders that judgment be entered herein in favor of the petitioners in accordance with the prayer of the petition.

Wherefore, by reason of the law and the evidence and the findings aforesaid, it is hereby ordered adjudged and decreed that each and all of the proceedings taken by the Nampa & Meridian Irrigation District to secure and provide for the authorization of the execution of the certain contract between the United States of America, the Payette-Boise Water Users Association, and the Nampa & Meridian Irrigation District (a copy of which contract is attached to the amended complaint herein as Exhibit "B" and by reference is made a part hereof) and affecting the legality and validity of
115–167 the authorization of the execution of the said contract up to and including the resolution of the Board of Direc-

tors of said District, declaring that election held in said Nampa & Meridian Irrigation District on the 10th day of October, 1914, authorizing the execution of said Contract, had been in favor of the execution of the said contract and that said contract was authorized to — executed by said District, which resolution was adopted by the said Board of Directors of the Nampa & Meridian Irrigation District on the 12th day of October, 1914, be and the same are hereby confirmed and approved and declared valid; and that the Payette-Boise Water Users Association Ltd. has the power and authority under and by virtue of its corporate existence to execute such contract; and further that the United States of America has under the law the authority to execute said contract and that when said contract has been executed the same will be a valid contract and binding upon the parties thereto and the said contract will be a legal and valid obligation binding upon said District in the sums therein stated, and the execution thereof is duly authorized.

Dated this 20 day of May, 1915.

ED. L. BRYAN, *Judge.*

Filed May 20, 1915.

168 * * * * * * *

O. O. HAGA called and sworn as a witness for defendants testified as follows:

Direct ex. by Mr. Eldredge:

Q. What is your profession?
—. Lawyer.
Q. Where do you reside?
—. Boise.
Q. How long have you resided there?
—. Nearly 17 years.
Q. I believe you are one of the defendants appearing here?
—. Yes.
Q. I hand you def'ts Ex. 1 and ask you to state what that is?

169 A. That is a deed for certain lands from Lynch and wife aand Folsom and wife to myself.

Q. I believe there is 320 acres?
—. Yes.
Q. And this land lies within the Nampa Meridian Irr. Dist.?
A. Yes all of it.

Def'ts offer same in evidence as Def'ts Ex. 1 with the privilege of withdrawing and substituting a certified copy.

Petitioners object on the ground that the evidence is incompetent, irrelevant and immaterial. Overruled.

Q. I hand you def'ts Ex. 2 and ask you to state what that is.

A. That is a deed from W. W. Lynch and L. L. Folsom to myself of water permit No. 9 and water permit 3256 for the irrigation of the lands described in Def'ts Ex. 1.

Def'ts offer in evidence Ex. 2. Petitioners renew last objection. Overruled.

Q. I hand you def'ts Ex. 3 and ask you what that is?
A. Deed from James P. Taylor dated Nov. 29, 1910 to myself for water permit No. 9 then held by Taylor; this permit was also included in the deed which has just been introduced but in order to clear up the title, for some reason I don't recall now the deed was also taken from Mr. Taylor who was the original owner of that water right and also owned part of the lands embraced in Ex. 1.

Def'ts offer in evidence Def'ts Ex. 3. Petitioners renew last objection. Overruled.

Q. I hand you def'ts Ex. 4 and ask what it is?
A. It is the certificate of completion of works, issued Nov. 9, 1905 by James Stephenson, Jr., then State enginer to James P. Taylor for the completion of works built pursuant to permit No. 9, mentioned in Ex. 2 and 3.

Def'ts offer same in evidence as Ex. 4. Petitioners renew last objection. Overruled.

170 Q. I hand you def'ts Ex. No. 5 and ask you to state what that is?
A. That is the water license, No. 9 issued by the state engineer of the State of Idaho to myself based on water permit No. 9 which was mentioned in Def'ts Ex. 2 and 3 and also in def'ts Ex. 4.

Def'ts offer same in evidence as Ex. 5. Petitioners renew last objection. Overruled.

Q. I hand you def'ts Ex. 6 and ask you to state what that is?
A. That is the certificate issued by the state engineer of the state of Idaho Jan. 8, 1912 showing the completion of works built under permit No. 3256 which has been mentioned in some of the deeds introduced.

Def'ts offer in evidence Def'ts Ex. 6. Petitioners make the same objection. Overruled.

Q. Is this 320 acres owned by you now under cultivation?
—. Yes.
Q. And irrigation?
—. Yes.
Q. Do you obtain any water from the Nampa Meridian Irrig. Dist. for said lands or any part thereof?

By Mr. McElroy: I assume the record will show that all of the evidence is offered over the objection of petitioners as incompetent, irrelevant and immaterial and does not come within the scope of the case at bar.
By the Court: It may be so understood.

A. Yes sir there is about 80 acres of my 320 that is receiving and has received for a great many years water thru this district. The balance of the 320 is not susceptible of irrigation from the works of the district.

By Mr. Eldredge:

Q. For what reason?

A. They are above the works, there is no lateral of the district that is high enough to cover the balance.

Q. Def'ts Ex. 2 to 6 is the source of your water supply for the remainder?

Petitioner objects as not the best evidence. Sustained.

Q. You don't obtain from the Nampa Meridian other than water for the 80 acres?

A. That is all.

171 Q. I believe you stated you irrigated and farmed the remaining portion of the land?

—. Yes.

Q. I believe you answered you were one of the answering defendants?

—. Yes.

Q. Objecting to a further purchase of further water rights?

—. Yes.

Q. You have all the water for the land that you desire at this time have you?

Petitioners object as incompetent, irrelevant, immaterial and not calling for a definite statement of facts.

By Mr. McElroy: At this time it will be our contention that on the theory of the defendants if they have a water right that won't last, or only lasts until the middle of the season it will be beneficial to them to have that water right supplemented, hence this statement, we say is indefinite and meaningless.

Objection overruled.

A. The only additional water that I desire and need is during the low stage of water, from about the middle of July until about the 20th of August, we estimate it, when the Boise river is low and we could use storage water or I could; the balance of the limited amount of storage water at that season I could use and would contract for it if I had an opportunity. I will say I entered into a contract with the Payette Boise Water Users Ass'n for 40 acres of my land, which can be irrigated to better advantage from their system than from the works I have, altho part of it is being irrigated from my own works, the works mentioned in these exhibits.

By Mr. Eldredge: You entered into one of the contracts about which Mr. Barker testified with the Payette Boise Water Users Ass'n.?

A. Yes, but I entered into it just recently 2 years ago for 40 acres S. W. ¼ of S. E. ¼ of sec. 21, I think it was, about 2 years ago.

Q. That was for the purchase of storage water?

172 A. Yes and also—it is a regular contract with the Payette Boise water Users Ass'n, and I will say I authorized the district last year when they sent out requests to the land owners for water for storage water; I first requested them to contract I think for 100 acre feet for my 320 acres; they declined to contract for more

than 160 of it, claiming I wasn't entitled to water for the other 160; it had been classified as dry land in their district, and wanted me to limit my application to what they considered the wet lands in the district which would be the part of the southwest quarter of sec. 22, so I cut the application down to 50 acre feet. If I had an opportunity however I should want 100 acre feet for the whole 320 purely storage water in the low water period.

Q. What character of stream do you obtain your water from?

A. 8 mile creek, which runs thru my place and I also have another ditch that is not mentioned in either of these permits which might be called 5 mile, which also runs thru my place.

Q. You have a system of ditches and laterals built for the purpose of using this water?

A. Yes sir constructed at a great deal of expense.

Q. Could you estimate approximately the expense this system of irrigation has put you to?

Objected to as incompetent, irrelevant and immaterial. Sustained.

Cross-ex. by Mr. McElroy:

Q. What year did you buy this land?

A. About 5 years ago, 1910.

Q. 80 acres is supplied with water from the District?

A. About that they allow me 50 inches.

Q. Have you any contract with the Payette Boise water Users Ass'n.?

A. I have.

Q. On which part of the tract?

173 A. It is on the S. W. ¼ of the S. E. ¼ of sec. 21.

Q. On which part of your ranch did you use the district water?

A. I used that on the southwest quarter of sec. 22 primarily on what you might call the east part of the ranch there is part of that quarter I can't irrigate from the district system.

Q. How many acres do you irrigate with waste water?

A. I can irrigate nearly all of the 320 acres there is a little I could not but most of it could be irrigated from 8 mile and 5 mile creek whatever it may be called that goes thru my place.

Q. Are you able to state the number of acres that you have irrigated with waste water?

A. I think I have all of it—if you call it waste water, it is the water from 8 mile creek and this other creek.

By Mr. Eldredge: Objected to as not proper cross-examination and there is nothing to show that 8 mile and 5 mile is waste water. Sustained.

By Mr. McElroy: You irrigated a part of this place with waste water do you?

Objected to as not proper cross-ex. Overruled.

A. I irrigate from the ditches that are described in these permits and licenses that have been described and offered here.

Q. Where does the water come from that is in these ditches?

A. Comes from 8 mile creek and from a creek that runs thru my place from the southwest quarter of sec. 22 east and west near the centre of the quarter section, it carries a good deal of water especially in the summer time; in fact it does me more or less damage and to avoid damage from that water I am taking it out of the draw and using it for irrigation purposes, carrying it up higher.

Q. You use that water as a matter of self defense?

A. Not entirely, I can use it to advantage, but if I don't use it for irrigation it would do more or less damage in running thru some lower places on the ranch.

174 Q. Where does that water come from?

A. I don't know where it comes from to begin with; it comes from an easterly direction on to my place, comes thru Mr. Ingals and Mr. Henderliters place to the east of me.

Q. Have you made an investigation to find where that water comes from?

A. Sometimes it comes from snow and rain and some times no doubt it comes from irrigation of land above me, how far above I don't know I have not followed it to see.

Q. Do you know what is commonly termed waste water?

Def'ts object for the reason it calls for a conclusion of witness. Overruled.

A. I think the term is rather an elastic one, some people I understand mean by that water that runs off a man's place on to your place from the man above you on to your place, and in that sense I don't think I use any waste water, none that I know of but in the sense that water comes thru creeks or low places from a considerable water shed the supply being augmented by the irrigation of the lands within that water shed, if you mean by that waste water then I have no doubt but what I use waste water to some considerable extent.

Q. During the irrigation season from what source of supply does the water come to that water shed?

A. Outside of what might fall as rain in the natural way it would be water from the government canal that might escape thru seepage for miles above me and used by a number of farmers, quite a large community above me, and eventually thru springs or surface run-off collects in 8 mile creek, which flows thru my place.

Q. All of that water supply that comes to your place except that which results from rain or snow falling on that water shed is water which is diverted from Boise river thru the New York canal

175 and distributed to land on this water shed is it not?

Def'ts object for the reason it calls for a conclusion of witness and calling for testimony of an expert witness and the witness hasn't testified he knows of his own knowledge where it comes from.

By the Court: If he doesn't know he can say so.

A. I think it is diverted from Boise river beyond question, thru the New York Canal; how much of it has been taken from that canal

for the benefit of other land owners and eventually found its way back into the creek and how much has escaped thru seepage and springs I don't know, I think it would come from all these sources combined.

Q. Do you know of any springs up there?

A. During the irrigation season—I could not say from having examined the springs but it is my understanding there are underground flows coming into the channel of that creek as well as surface flow.

Q. Do you know what sort of streams those are exclusive of the supply of waste water, do you claim those are natural springs or streams?

A. They are natural springs to the extent that the water that falls in the shape of rain or snow within the basin and that runs off gathers in these springs; they are the low channels for a considerable area, but in the summer time some time after the rainy season is over I don't think they would carry any water except for the fact that water is carried into that basin thru the government canal.

Q. What happens when the government canal ceases to carry water?

Def'ts object as assuming a condition not proven or testified to. Sustained.

Q. Is there any water supply there at all after about the middle of July each year?

176 A. That depends on the year, a year like this, if there is no irrigation in the basins above me I don't think there would be unless there should be after a shower.

Q. How about last year?

A. There was more or less irrigation different times during the season and the supply was variable during the low water season.

Q. How much water did you receive if any approximately after the irrigation ceased above you?

A. I could not state that, not very much irrigation above me ceased of course during the time that the country was dry and there would not be probably any water in that creek some time after the irrigation of the land in the basin stops, unless there would be a rain.

Q. In an average season during what period of time do you lack this water right, beginning with during the months of July, August and September?

A. We don't figure that the Boise river gets so low that the New York canal is practically cut out near the middle of July, and when the Boise river reaches that stage it practically cuts off the supply in this 8 mile creek.

Q. Then during the average season unless the lands above you are using stored water from the government canal your water supply will be cut off practically during a large part of the month of July and the whole of August and September?

A. That will depend on how early the rain starts in, but if there was no rain and there was no irrigation in the basin above me then

there would be no water in 8 mile that I could depend on for irrigation.

Q. Heretofore that has been the case?

A. That has been the case to a large extent that season of the year.

Q. Isn't it a fact your land would be benefitted by a storage water right to supplement this water right you already possess?

177 A. As stated on the direct examination I authorized the district to subscribe for storage water during the low water season but not for the full year supply because until the river gets low there is no occasion for my paying for water during that time of the year, because if I don't use it it runs thru my place and does more or less damage.

Q. You are acquainted with the reclamation law are you not?

A. To some extent.

Q. Isn't it a fact that except thru this irrigation district that you cannot secure from the government a permanent supply of storage water to supplement your water right.

A. No I don't know that, I bought a right from the district about 2 years ago.

Q. Assuming this is the case then you will be very materially benefitted by this contract will you not?

A. Under that right for a month or a month and a half during the summer time would not be worth $75 an acre to me or anything near that.

Q. Would it be worth anything?

A. Yes.

Q. What would it be worth?

A. Whatever storage water would be worth during that season of the year, I think your contract calls for storage water on the basis of $30 an acre foot and on that basis my whole 320 acres including what is in the district I could use about 100 acre feet.

Q. Assuming that after the project has been opened there will be no opportunity for you under the law to get storage water to supplement that water right except under this contract then this contract would be a benefit to your land?

Def'ts object on the ground that there is nothing in the record to show and the witness has not testified to any such condition that he could not obtain a water right other than under this contract entered into, and there is nothing in the record anywhere

178 to show such a condition but practically to the contrary, that persons who hold contracts with the Payette Boise Water Users Ass'n are entitled to buy water, and for the further reason that it is not proper cross-examination. Overruled, subject to the objection.

A. If you mean by that I would have to submit to a confiscation of the rights I have in order that I might get storage water during a month or two during the season then I would not take storage water on that basis from the government or any other person.

Q. Assuming you would only be charged pro-rata for sufficient government water to supplement your existing rights, water right, whatever it may be, I will ask you if that would not be a benefit?

By Mr. Eldredge: Object to the question because of assuming a state of facts that do not exist, that the contract itself provides that the district will assess every acre of Mr. Haga's land not now supplied by the district at $75 an acre.

Overruled.

A. Supplementing my present water right, as I have stated during the low water season I would consider it a benefit and I am always willing to bear my pro rata part of the cost of that kind, there is no objection to the District entering into a contract, as far as I am concerned that would charge me up only with water that would supplement my present right, my objection simply being to the attempt to confiscate what I have, I don't consider as fair.

By Mr. Stoutemyer: Then as I understand your position you don't contend that the furnishing of water from the Government project to your land is of no benefit to your land, but you do contend that it is not as great a benefit as it would be to other lands which have no existing water right, and therefore you should not be
179 assessed as great benefits.

A. In a way yes sir, in other words I have ditches that have been built at a great deal of expense and I have acquired rights from independent sources at a great deal of expense and I don't think I should be — that the district should without my consent buy for me a new water right, totally ignoring what I have got.

Q. Your condition and your farm is a very peculiar condition, it is limited to a very limited area is it not?

A. I could not answer that I don't know how many people have acquired — You understand for several years the District has always declined to furnish water to my place in excess of 50 inches which they have confined and was confined by natural conditions to about 80 acres of the ranch and I therefore had to get water for the other 240 acres from other sources.

Q. This is a question which goes to the amount of benefits which should equitably be assessed to this particular tract of land?

A. So far as I am concerned personally I am not standing in the way of the proper amount of water during the low water season in the river to be charged up against my place, but it is the full water right, totally ignoring what I have that forces me into this controversy.

Q. You don't object to paying for what benefits your land actually receive?

A. Not at all.

Q. You concede it would receive some benefits?

A. To the extent I have explained, that after the middle of July as conditions now are I can use a limited amount of storage water to advantage on my place.

Q. Into what stream does 8 mile creek flow?

A. I suppose it flows eventually into Boise river; it strikes
180 the Ridenbaugh canal the canal of the District just at the lower portion of my place and I think it flows into the canal, the Ridenbaugh, I am not sure, to some extent, some of it goes under the canal.

Q. Is that a natural stream which joins five mile and eventually reaches Boise river?

A. I don't know whether you could trace the channel of it maybe it does, I have not followed it.

Q. Do you know what is the total amount of the decreed rights from Boise River prior in time to your right on this tributary?

A. No I don't, I wasn't a party to the water suit and the water that I take out of 8 mile never would reach the Boise river it would spread out over the plains below except during high water.

Q. How do you know it would not reach Boise river?

A. You go a mile or so below you don't see any water in the channel. There is a good deal of water in 8 mile creek that is cut off by the Ridenbaugh canal and it backs up and tends to flow some on my land.

Q. Isn't there an outlet under the canal that carries that water out.

A. There was at one time and I think the District had some litigation over that outlet with the man below Mr. Teeters, I think there was a lawsuit between Mr. Teeters and the District for letting that water run thru his place, so as I say it is in a measure in self defense I am using that for irrigation.

Q. Isn't there a channel to this stream that goes on down to the Boise river thru which the water would flow and reach Boise river if not diverted by yourself and other persons who are diverting it?

A. I don't think there is anyone below me diverting water from 8 mile. It would go thru Teeters' place and I think since
181 the District put in a bank so the water can't go thru, Mr. Teeters has commenced to farm the land below and is farming it over what would constitute the channel. There are some diversions above me.

Q. Have you examined this stream above the point where it comes into the irrigated district, that is above the point where it crosses the government canal?

A. No I have not been any further than about up to the government canal on that stream.

Q. Have you noticed that even at this early period in the irrigation season that stream is dry above where it is supplied by the run off from the irrigated lands?

A. I don't know as to that I have not been there, I know it is carrying a good deal of water at this time and has all spring.

By Mr. McElroy: You are acquainted with the suit of the Farmers' Co-Operative Canal Company, Vs. The Riverside Irrigation District et al., the priority suit?

A. I know something about it.

Q. Your right as permitted by the state engineer would come subsequent in order of time to these rights wouldn't it?

A. I don't think it has any relation to these rights.

Q. That suit was begun about 1903 was it not?

A. I don't know what time the suit was commenced. The Ridenbaugh canal where it crosses 8 mile creek has no particular bank consequently the water that comes down 8 mile creek there flows into the Ridenbaugh canal or is backed up when the Ridenbaugh canal is carrying a full head of water, it is backed up into the creek and does considerable damage in my place.

Q. This canal has appropriated this water for a large number of years?

A. I don't know.

Q. Does the water run under the canal or into it?

A. It usually stands in the creek at the lower end of my place.

182 Q. Is there a siphon under the canal at that point?

A. I think there was at one time but I don't think there is now.

Q. Then isn't it a fact that that canal has appropriated that waste water?

A. No, I don't know anything about what the facts are as to your appropriation, I thought you had a Boise river appropriation.

Q. If the canal took the water before your appropriation then you are trespassing on the rights of the canal?

A. Then you should not be buying from the government if you already own it; the- I should have it because I am in the district.

Q. Suppose we distributed it to other parties?

A. But you are not, you are backing it up on me.

Q. You claim this water right as a matter of self defense.

A. No I claim if I didn't use it it would cause damage, I am satisfied with it with the exception of that little storage water I need during the summer months.

By Mr. Eldredge: You were asked concerning the benefits you *you* would derive if this contract was entered into, I will ask you to state that if that contract was entered into and assessments made against your land as provi-ed in the contract to the amount of $75 per acre, for a water right for your 240 acres, and with the water rights you now have will be ignored and that the district will distribute to you only water sufficient for 160 acres of your 240 acres, and deny you water for the other remaining portion of the 240 acres, would you consider yourself benefitted?

Petitioners object as incompetent, irrelevant, immaterial, calling for a conclusion which the witness cannot give and assuming facts not in evidence. Overruled.

A. I would consider it a distinct damage to a very large sum.

183-193 Q. If the contract were entered into and the district purchased a water right for your land for 240 acres and

only furnished you water in a supplemental way for 160 acres would you consider you were benefitted?

Petitioners renew last objection. Overruled.

A. Most certainly not.

Q. Have you ever authorized the Boise Payette Water Users Ass'n or the Nampa Meridian Irri'g Dist. or the Government of the United States or the Secretary of the Interior to cancel the contract which you have between the Boise Payette Water Users Association and yourself?

A. No sir.

By Mr. McElroy: All of the water rights mentioned in the water permits and deed offered in evidence from 8 mile—are from 8 mile creek, are they not?

A. No, the permits mentioned there are from 8 mile creek, yes sir I think the permits mentioned are all from 8 mile, but different points of diversion, one diverted near the south end of my place, and an old ditch, being used 10 to 12 years, and the other a couple of miles south of my place, that ditch is 3 or 4 miles in length, that was built about 8 years ago or 7 years ago.

Witness excused.

* * * * * * *

194 J. W. Brose called and sworn as a witness for defendants testified as follows:

Direct ex. by Mr. Eldredge:

Q. Where do you reside?

A. Near Boise.

Q. How long have you lived near Boise?

A. 25 years coming this August.

Q. You heard the testimony of Mr. Rose and heard his describe the land there on 10 mile did you?

—. Yes.

Q. Are you familiar with that land?

—. Yes.

Q. How long have you known that land?

A. The particular land described by Mr. Rose, the Grimmett place I got acquainted with it in 1893 or '4.

Q. What condition was it in then?

A. It was sage brush then, Mr. Grimmett had taken it up as a home stead.

Q. How long after that time was,—or about what time was the land reclaimed?

A. I could not state positively, I think it was 7 or 8 years ago that I was over there for a specific purpose and I noticed then there was about 60 or 70 acres in cultivation, I am just guessing at the area.

Q. Had you ever observed whether or not the property had been reclaimed or any part of it prior to that time?

A. Prior to that time I didn't notice it as to the reclamation.

Q. Were you familiar with water conditions of 10 mile in that vicinity and in the vicinity of the New York canal prior to the time that the New York canal was built.

195 A. Yes.

Q. Was there water in 10 mile at the Grimmett or Blucher place prior to the time the New York canal was built.

A. Judging from conditions above I think there was. I never was down there to notice, they had a well there of course.

Petitioners move to strike the answer out as a conclusion of witness. Sustained.

Q. Did they have a well at the Grimmett place prior to the building of the New York canal?

—. Yes.

Q. Was there water in 10 mile above the Grimmett place prior to the building of the New York canal?

—. Yes.

Q. Was any water being diverted or used for irrigation along there prior to the building of the New York canal?

A. Yes sir there was several parties developing water; I developed water in one place myself about a mile a little more than a mile above the present New York canal and a man by the name of J. C. Shangell took up the 160 on 10 mile bottom where it makes the curve and he had water that he developed and brought out on to his land below, before the New York canal was built.

By Mr. McElroy: Move to strike out the testimony for the reason that it does not show that the water supply was sufficient for the appropriation at the time it was made for this land.

By Mr. Eldredge: This testimony was for the purpose of showing that the water now being furnished for the Blucher place during the entire season of the year as testified to by Mr. Rose is not seepage water from the New York canal.

By the Court: The answer may stand.

By Mr. Eldredge: When was the New York canal built?

A. They were building part of the canal in '90 when I came here but the the section remained unfinished for years and I think it was about — I don't exactly remember but I don't believe they carried water in it until about 10 years later.

196 Q. I have forgotten what year you said the building of the New York canal began?

A. They built the upper section in 1890 from Thompson's place up that was the only part that was built, 3 miles of it about but the balance of it wasn't built until afterwards.

Q. No water was used in it there until about 1900?

A. Somewhere about that time.

By Mr. McElroy: Can you state positive- the time the New York canal was built across 10 mile?

A. No I say I can't but it was built subsequent to 1890.

Q. The first time you saw water used on this land was 7 or 8 years ago?

A. On which land have you reference to?

A. The tract you first described, the Blucher tract?

A. I think it was 7 or 8 years ago when I first saw it irrigated.

Q. The New York canal was there then?

A. Yes.

Q. You don't know the extent of the water supply of 10 mile as a natural stream at any time?

A. No only what we took out.

Q. What year did you do that?

A. I think it was '93 or '4, a man by the name of Randolph and I developed it.

Q. How much did you develop at that time?

A. It would vary, take it in the spring of the year up to about the first of June we had 50 or 60 inches approximately in the ditch, in order to get it we went down about 6 feet to get the overflow, and we simply had an open ditch in order to get it and as the snow went back in the hill our water supply decreased altho we always had a little water running, 8 or 10 inches of water running all the season.

Q. About when would the supply of water stop except a little?

A. We had a little of it running in August even and September some.

197 Q. What do you mean by a little?

A. Enough for stock purposes and keep a garden going because the soil is very porous and requires a great deal of water.

Q. That natural water right from 10 mile was really a spring water right up until the middle of the summer about?

A. Yes but you could make pretty good crops any season, the entire season.

Q. You could not irrigate with it after mid summer?

A. No I would say there would not be enough to irrigate after that time.

By Mr. Eldredge: We desire to offer in evidence Petitioners' Ex. B, the form of contract proposed to be entered into in support of our cross complaint, it is Exhibit B to the petition of petitioners, as Def'ts' Ex. 9.

By Mr. McElroy: It is already in evidence.

By Mr. Eldredge: Not for our purposes.

By the Court: If Mr. Eldredge desires it for his own exhibit I don't see why he should not have it.

J. A. REMINGTON recalled as witness by defendant testified as follows:

Direct ex. by Mr. Eldredge:

Q. I hand you what purports to be a list of apportionment of cost and I will ask you to state if you can find the land of O. O. Haga" —. Yes sir.

Q. I will ask you what proportion by way ... number of acres

Mr. Haga'- land, concerning which he gave his testimony is classed as wet lands?

By Mr. McElroy: I would suggest if this is to go in at all the witness give what appears here.

By the Court: I think the record is the best evidence.

By Mr. Eldredge: You may read from the record you have.

A. Under assessment No. 712 S. E. ¼ Sec. 21 3-1 we find is assessed to Oliver O. Haga 160 acres project land, listed here as dry land assessed with a government water right at $75 an acre
198 in an amount of $12,000, and under assessment No. 719 the S. W. ¼ of 22 3-1-E is assessed against Oliver O. Haga with one second foot of old water rights and classified as being 80 acres of wet land and 80 acres of dry land, assessed with drainage amounting to $871.04, with U. S. Water right amounting to $6000 and U. S. storage water right amounting to $1500, total $8371.04, rate per acre $52.31.

Q. That rate per acre refers to the entire 160?

—. Yes.

Q. If the 80 acres were segregated what would the rate per acre be on the remaining 80?

A. You mean if the 80 acres were dry land?

Q. Yes.

A. It would be $75.

Q. Can you find the Grimmett or Blucher land?

A. Yes.

Q. It is understood this is cross examination under the statute.

Mr. REMINGTON on behalf of the district is called for cross-examination under the statute.

—. Have you found the Grimmett land?

A. Yes, two assessments against the Grimmett property.

Q. Read what you have.

A. Assessment No. 766 S. E. of the N. W. Sec. 32-3-1 East, assessed in the name of Jary J. Grimmett, there is an assessment against 39.6 acres classified as dry land amounting to $2975, for a government water right at $75 an acre, four tenths of that 40 is classed here as non-irrigable land, assessment No. 767 assessed against James Grimmett and G. S. Brown N. E. ¼ S. E. ¼ and the N. ½ of N. W. ¼ of the S. E. ¼ Sec. 32-3 N. 1 E. B. M. 60 acres, assessed with U. S. Government water right $4500, $75 per acre.

Q. How many acres all told is that?

A. All told 100 acres even.

Q. What have you done with the remaining 60?

A. It is outside of the district.

199 Q. Have you a map here, I believe you introduced one showing the boundaries of the district.

A. No I have none there may be one here.

Q. Doesn't the entire land as described by Mr. Rose's testimony the entire 160 appear as being in the District on this map?

A. I don't remember the description he testified to.

Q. The S. E. ¼ of the N. W. ¼ and the N. E. ¼ of the S. W. ¼?

A. It is outside as shown by this map as being outside.

Q. Then you give it as your judgment that there is only 100 acres in the district?

A. Yes I know that to be a fact.

Q. You have assessed that entire 100 acres as project land, dry land?

—. Yes.

By Mr. McElroy: Referring to the Grimmett land that lays above what is known as the Main Ridenbaugh canal?

—. Yes.

Q. How does it lie with reference to the canal known as the Farmers' lateral of the Ridenbaugh extended?

A. It is under the proposed survey of the Farmers' Lateral.

By Mr. Eldredge: The proposed survey?

A. It has never been constructed it was never built. it was a proposed extension of the Farmers' Lateral.

Q. When was that proposed?

A. In 1905 when the district was organized and the map was made showing the proposed ditches.

Q. It has not been constructed yet?

A. Never was constructed.

By Mr. Stoutemyer: This Grimmett land is the same as the Blucher land?

—. Yes.

By Mr. White: Did you take in all of the land in this Grimmett tract that lay below the Farmers' Lateral Extension into the district?

A. That is my understanding.

Q. All of the land that lays below that Farmers' lateral
200–207 extension on the Grimmett tract is in the district?

A. This portion I read in the proportion of costs is in the district.

By Mr. Eldredge: Is that all of the Grimmett land and Blucher land that is within the district?

A. Yes sir that 100 acres.

Q. If there is more land of the tract that lies below the Farmers Lateral than 100 acres would that be in the district or not?

A. This is the description I gave here that is inside of the district. but the reason that land was taken into the district was because it was proposed to extent the Farmers lateral.

(Excused.)

F. E. ROSE recalled as a witness by defendant and testified as follows:

Direct ex. by Mr. Eldredge:

Q. I hand you plaintiff's petition and will ask you to examine the map marked Exhibit A to plaintiffs' petition and ask you to state if the Grimmett land or Blucher land is shown by said map as being within the Nampa Meridian Irrigation District as the land that is now being irrigated and has been for the length of time you testified you had known the land in your former testimony?

A. Yes sir this is the land they have classified as dry land is the land that has been irrigated for all these years.

Witness excused.

Defendants rest.

Petitioner's Rebuttal Testimony.

* * * * * * *

208-214 (Title of the Court and Cause.)

Notice of Appeal.

To the above named petitioners, and to H. E. McElroy and B. E. Stoutmeyer, their attorneys of record, and to L. C. Knowlton, Clerk of the above entitled Court:

You and each of you will please take notice that the defendants in the above entitled action hereby appeal to the Supreme Court of the State of Idaho from that certain Judgment, made and entered in the said cause against the said defendants in favor of said petitioners on the 20th day of May, 1915, and from the whole thereof, and from the order of said Court made and entered in said cause on the 5th day of June, 1915, overruling defendant's motion for a new trial therein and from the whole thereof.

Dated this 18th day of June, 1915.

J. B. ELDRIDGE,
FLOYD C. WHITE,
Attorneys for Defendants,
Residence, Boise, Idaho.

Filed June 19, 1915.

* * * * * * *

215 BOISE, IDAHO, November 20, 1915.

SUPREME COURT, STATE OF IDAHO, *ss:*

Court met pursuant to adjournment.

Present: Hon. Isaac N. Sullivan, Chief Justice, Hon. Alfred Budge, Justice, Hon. Wm. M. Morgan, Justice, and the officers of the court, when the following proceedings (among others) were had, towit:

No. 2710.

JAMES G. PETRIE et al., Appellants,
vs.
NAMPA-MERIDIAN IRRIGATION DISTRICT, Respondent.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Budge, to the effect that the judgment of the lower court be affirmed.

It is therefore considered, adjudged and decreed by the court that the judgment of the District Court of the Seventh Judicial District in and for the county of Canyon in the above entitled cause be and the same hereby is affirmed. Costs are awarded to respondent.

216 Filed Nov. 20, 1915. I. W. Hart, Clerk.

In the Supreme Court of the State of Idaho, September Term, 1915.

NAMPA & MERIDIAN IRRIGATION DISTRICT, Respondent,
vs.
JAS. G. PETRIE et al., Appellants.

Opinion of the Court.

Irrigation Districts—Confirmation of Proceedings—Power of District to Contract for Additional Water Supply—Power of District to Provide Drainage System—Contract with United States for Additional Water Supply and Joint Construction of Drainage System—Power of District and Secretary of Interior to Contract—Assessment of Benefits—Confirmation of Proceedings not Adjudication as to Benefits—Government Rules and Regulations—Limitation of Use of Water on Reclamation Project to 160 Acres.

1. Sec. 2401, Rev. Codes, under title 14, Irrigation Districts, authorizes special statutory proceedings, which may be brought by the board of directors of an irrigation district in the district court to determine the validity of the successive steps taken under the provisions of this title for the purpose of authorizing the district to enter into a contract with the United States as provided by secs. 2397 and 2398, Rev. Codes. This proceeding is not brought for the purpose of assessing benefits of the lands within such irrigation district.

2. The authority of an irrigation district to enter into
217 contracts with the United States to supply water for the irrigation of arid lands, or supplemental water rights, or both, within the jurisdiction of the district is provided under secs. 2397 and 2398, Rev. Codes. (Pioneer Irr. Dist., v. Stone, 23 Ida., 344, cited and followed.)

3. Boards of directors of irrigation districts are authorized, upon compliance with secs. 2396-2401, Rev. Codes, to contract with the

United States for the construction, conjunctively, of a drainage system for the purpose of properly draining waterlogged lands within the jurisdiction of such districts. (Bissott v. Pioneer Irr. Dist., 21 Ida. 98; Pioneer Irr. Dist. v. Stone, supra, cited and followed.)

4. The Secretary of the Interior by an act of congress of June 17, 1902, known as the Reclamation Act (32 Stat. L. 388, 7 Fed. Stats. Ann. 1098, U. S. Compiled Stats. (Supp. 1911), p. 662, an act of congress of February 21, 1911, known as the Warren Act (36 Stat. L. 925), and the subsequent act of congress passed August 13, 1914, known as the Reclamation Extension Act, is authorized to enter into a contract with an irrigation district to supply water to irrigate arid lands or to supplement water rights for lands partially irrigated within the jurisdiction of such irrigation district; and also to contract with such irrigation district for the joint construction of a proper drainage system where the waterlogged condition of lands within said district is partially due to the location of a government canal and water flowing therefrom.

5. Where a contract is entered into between an irrigation district and the United States, providing, among other things, that arid lands within the jurisdiction of the irrigation district, in order to secure a full water right from a government project shall be assessed not to exceed $75 per acre, such contract is subject to the laws of this state governing irrigation districts and to the apportionment of benefits thereunder, and the fixed charge to be as-
218 sessed against the lands of any particular land owner within such irrigation district for such water right will be finally determined by the district court of the judicial district within which said irrigation district is located, as provided by secs. 2400-2403, Rev. Codes.

6. The same rule and the same procedure, as indicated in paragraph 5, is to be followed in the assessment of benefits with reference to the sale of partial water rights to supplement water rights already existing, and also with reference to the assessment of benefits incident to the construction of a drainage system within an irrigation district.

7. A judgment of the district court which confirms the proceedings of an irrigation district in entering into a contract with the United States to supply water to irrigate lands within the district, and providing for the joint construction of a drainage system, is not res judicata so far as the assessment of benefits to the lands within the district is concerned, and does not preclude statutory proceedings for such assessment.

8. The dominant purpose of our irrigation district law is to facilitate the economical and permanent reclamation of our arid lands, and it must be the constant aim of judicial construction to effectuate that purpose so far as consistent with the whole body of our law. The continued existence of an irrigation district depends upon its ability to furnish water to land already within the district. The stability and efficiency of the district as a quasi municipal corporation also depends upon the power to construct proper drainage within its limits. In the absence of either the right to furnish an adequate

water supply or construct an effective drainage system, the very purpose and object of the district would be thwarted and the growth and development of the state retarded to its serious detriment.

9. Congress has the undoubted power to restrict the right to
219 the use of water furnished from government projects to 160 acres standing in the name of any one landowner. Having the power to dispose of the right to the use of water made available by the completion of a reclamation project, congress is in a position to fix the terms and conditions of the use and to authorize the Secretary of the Interior to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying its legislation into full force and effect. But the exercise of such power by congress does not imply the assumption of federal authority to classify or control the assessment of benefits to lands within an irrigation district organized under the laws of this state, although such lands may also be embraced within a federal reclamation project.

Appeal from the district court of the Seventh Judicial District, in and for Canyon county. Hon. Ed. L. Bryan, Judge.

Action for the examination, confirmation and approval of a contract between the Nampa & Meridian Irrigation District and the Secretary of the Interior. Judgment for plaintiff. Affirmed.

J. B. Eldredge, Floyd C. White, for appellants.

H. E. McElroy, B. E. Stoutmeyer, for respondent.

220 BUDGE, *J.*:

The original petition in this case was filed February 8, 1915, by the Nampa & Meridian Irrigation District for the examination, approval and confirmation by the district court of a contract with the Government of the United States under which certain arid lands within the jurisdiction of the Nampa & Meridian Irrigation District are to be supplied with water for irrigation, and to provide for the dranage of lands within said irrigation district which are waterlogged, as well as to secure supplemental storage water for the purpose of furnishing an adequate supply of water to properly irrigate lands within said district that are now being partially supplied through the Ridenbaugh Canal owned and operated by the Nampa & Meridian Irrigation District.

The court, upon the filing of said petition, entered an order fixing the 22d day of March, 1915, for the hearing of the petition. A demurrer to the petition was interposed by J. G. Petrie et al., setting forth numerous objections to its form and sufficiency, which said demurrer was in part confessed; and thereafter on March 31, 1915, amended petition was filed.

Said amended petition, inter alia, alleges ownership by the Nampa & Meridian Irrigation District of the Ridenbaugh canal; that said canal has a capacity sufficient to irrigate only 27,000 acres of land within the boundaries of said district; and that there are within the

boundaries of this district 44,060 acres of land which have not been irrigated, for the reason that the supply of water furnished by the district is inadequate. It further alleges that the United States, by and through its reclamation service, is engaged in the construction of an irrigation project to properly irrigate said 44,060 acres of land within the boundaries of the Nampa & Meridian
221 Irrigation District.

It also appears from the petition that as an unavoidable consequence of the location of the government canal on the higher land, being what is known as the New York Canal, and the use of water on such land for irrigation, as well as the carriage of water in the Ridenbaugh Canal and the use of water therefrom for irrigation, being the only source of artificial water supply in that locality, the surface-waste waters and the underground-seepage waters, resulting from the carriage of water in the canals and the irrigation of the lands, move in a northerly direction across the lands of the district to their drainage outlet in Boise River. This drainage water had waterlogged approximately 2,796 acres of the lands watered from the Ridenbaugh Canal and 1,784 acres of the dry lands within the district, up to the month of November, 1913. This affected area is constantly increasing, and it is proposed, as a part of the general plan of the Nampa & Meridian Irrigation District in its contract with the United States of America, to provide for the proper drainage, by the construction of a drainage system, of the lands thus affected.

The petition also alleges that when the Boise project was first promoted, landowners of land in that project organized a corporation known as the Payette-Boise Water Users' Association, Ltd., at the instance of the United States Reclamation Service, which was to be a means whereby the Reclamation Service might deal collectively with the landowners in that district who were required to purchase stock in said corporation and to enter into contracts for securing water rights for their lands from the Boise project; that the water rights distributed by the Nampa & Meridian Irrigation District from the Ridenbaugh canal are not full-season rights, but are sub-
222 ject to cut in the latter part of the irrigation season; that a large number of the landowners in that irrigation district who were receiving water from the Ridenbaugh canal entered into agreements with the Payette-Boise Water Users' Association, Ltd., for the purpose of securing a supplemental water supply of stored water from the Boise Project for use on their lands during low water season; that it is proposed in the contract between the Nampa & Meridian Irrigation District and the United States of America that these individual contracts between the landowners and the Payette-Boise Water Users' Association, Ltd., be cancelled, and that the landowners purchase from the United States such amounts of stored water through the Nampa & Meridian Irrigation District as have been applied for by such landowners—and no more—the same amounting to approximately 880 acre feet, and costing $24,840, which will be a charge assessed only against landowners within said district who have made application for supplemental water; that the plan for drainage and the acquisition of water rights was, by resolu-

tion of the board of directors of the Nampa & Meridian Irrigation District, adopted, and the proposed contract between the district and the United States entered into after the same had been examined and approved by various competent engineers, including the state engineer of the state of Idaho; that notice of election was duly given and the election subsequently held; and that 1,206 votes were cast for, and 160 against, the contract, and it appearing that more than two-thirds of the electors of the district had voted for the contract it was declared carried.

To this petition a demurrer was filed and, by stipulation of counsel, overruled. On May 1, 1915, defendants filed their answer and cross-complaint to the amended petition, in which they admit paragraphs 1, 2 and 6 to 15 inclusive, of the allegations contained
223 therein, which, upon examination, is an admission of a full compliance with, and due performance of each and every act required by, sec. 2396, Rev. Codes, on the part of the irrigation district prior to submitting for examination, approval and confirmation the contract in this case to the district court of the judicial district wherein said irrigation system is located.

We will not recite, seriatim, the denials and the affirmative allegations contained in defendants' answer or the allegations of their cross-complaint, the substance of all of which is: First, that the district cannot enter into a contract to purchase water rights from the government for the irrigation of dry lands lying within the irrigation district; second, that the district has no jurisdiction to construct a drainage system in conjunction with the United States; third, that the district has no authority to purchase stored water rights from the government project to supplement rights in the Ridenbaugh canal to irrigate lands within said irrigation district to which that canal is appurtenant. To the cross-complaint of the defendants petitioners filed an answer.

Upon the issues thus made the case was tried by the court without a jury, and judgment was thereupon entered in favor of the Nampa & Meridian Irrigation District confirming the proceedings taken to secure and provide for the authorization and execution of the contract between the United States, the Payette-Boise Water Users' Association and the Nampa & Meridian Irrigation District, and confirming, approving and declaring said contract valid; from which judgment the defendants prosecute this appeal.

It will be seen from an inspection of the contract which the irrigation district seeks to enter into with the United States,
224 and to which appellants object, that there are three things desired to be accomplished; First, to buy water rights from the government for 44,060 acres of land within the district, which is arid in character and which cannot be irrigated from any other known water supply; second, to contract for the supply of stored water to supplement water rights now furnished to lands within the district from the Ridenbaugh Canal, owned and operated by the irrigation district; third, to secure a drainage system in conjunction with the United States Reclamation Service for the proper drainage of waterlogged lands within the district.

This is a special statutory proceeding authorized by sec. 2401, Rev. Codes, which provides, among other things: "The board of directors of the irrigation district shall file in the District Court of the county in which their office is situated a petition, praying in effect that the proceedings aforesaid may be examined, approved and confirmed by the court. * * * That after the organization of the district is complete, a petition may be filed for the confirmation of the proceedings so far, or after the authorization of any issue of bonds such petition may be so filed, * * *;" and is brought for a confirmation to the extent only of determining the legality of the proceedings authorizing the district to enter into the contract with the United States, and not for the purpose of the assessment of benefits to the lands within the irrigation district.

The proceedings sought to be examined, approved and confirmed by the court in this action are prescribed by sec. 2396, Rev. Codes, and are, in substance: (1) that the board of directors shall, by a resolution entered on its records, formulate a general plan of its proposed operations; (2) for the purpose of ascertaining the
225 cost, surveys must be made under the direction of competent engineers; (3) these must be submitted to the state engineer, and he must make a report; (4) the board must determine the amount necessary and call an election and submit the question of whether the right to enter into an obligation with the United States in the manner as in said section provided shall be authorized; (5) the election must be held in the manner provided, and the result declared; and if two-thirds of the electors shall vote for the contract, it must be declared carried, and the district will be authorized to make the contract. It is alleged in the petition that all of these statutory requirements were complied with by the irrigation district, which is admitted by the answer of the defendants.

The right of an irrigation district to enter into contracts with the United States to supply water for irrigation of arid lands or supplemental water rights, or both, within the jurisdiction of the irrigation district, is provided under secs. 2397 and 2398, Rev. Codes. (Pioneer Irr. Dist., v. Stone, 23 Ida., 344; Hillcrest Irr. Dist., v. Brose, 24 Ida., 376.)

The case of Bissett v. Pioneer Irr. Dist., 21 Ida., 98 supports the position taken by the Nampa & Meridian Irrigation District to the effect that it has authority, upon compliance with the statutes of this state governing irrigation districts, to enter into a contract with the United States, and to act conjunctively in the construction of a drainage system for the purpose of properly draining waterlogged lands within said district.

That the Secretary of the Interior has the power to enter into a contract to supply water to an irrigation district under the provisions of the act of congress of June 17, 1902, known as the Re-
226 clamation Act (32 Stat. at L., 388, 7 Fed. Stats. Ann. 1098, U. S. Comp. Stats. (Supp. 1911), p. 662), we think there can be no doubt. If there was any doubt of the authority of that official to enter into such contracts, it was clearly removed by the act of congress of February 21st, 1911, known as the Warren Act

(36 Stat. at L., 925, sec. 2) and the subsequent enactment of congress passed August 13, 1914, known as the Reclamation Extension Act, (sec. 7).

The contract provides, among other things, that the arid lands within the irrigation district, in order to secure a full water right from the Boise Project shall be assessed not to exceed $75 per acre. The amount, therefore, that will be eventually a fixed charge under the contract against the land of any particular land holder within the district will be finally determined by the district court, upon the assessment of benefits as provided under secs. 2400-2403, Rev. Codes. If it should be determined by the district court that any lands within the district are not benefited by reason of the application of water thereon, then no benfits can be assessed against them and no injustice can be done the land owner. While, on the other hand, should the district court find that by reason of the application of the water under the contract, the value of the land is increased and the owner is thereby benefitted, no wrong can result to him by reason of the assessment of such benefits.

The contract is subject to the laws of this state governing irrigation districts in the assessment of benefits. And the same principle of law will apply to the assessment of benefits under the contract here under consideration as was applied in the case of Knowles v. New Sweden Irr. Dist., 16 Ida., (on rehearing) 235, in which case it was
227 held by this court that "Where a party owns his own water right and would not receive any benefits from the organization of the district, he may, upon proper showing, have his land excluded from the district and from assessment," by appearing in the proper forum for that purpose.

Accordingly, if there are any lands within the Nampa & Meridian Irrigation District which are subject to irrigation from the waters received under the contract from the Boise Project, which have a water right in whole or in part, or that will not be benefitted by reason of the contract entered into between the United States and the irrigation district, said lands will not be subject to assessment in excess of benefits.

Sec. 2400, Rev. Codes, provides that notice shall be given to each of the landowners of the time and place the board of directors will make the assessment of benefits, when a hearing will be given to each owner of land within the district and his lands will be classified and assessed according to benefits received. Should any landowner make objection to said assessment or any part thereof before said board and said objection is overruled by the board and the landowner does not consent to the assessment as finally determined, such objection shall, without further proceedings, be regarded as appealed to the district court and to be heard at the said proceedings to confirm as aforesaid. Like objections may be urged by landowners who may be affected by the drainage system or stored supplemental water rights.

Sec. 2403, Rev. Codes, among other things, provides:

"The Court shall disregard every error, irregularity or omission which does not affect the substantial right of any party, and if the

court shall find that said assessment, list and apportionment
228 are in any substantial matter erroneous or unjust, the same shall not be returned to said board, but the court shall proceed to correct the same so as to conform to this title and the rights of all parties in the premises, and the final order or decree of the court may approve and confirm such proceedings in part, and disapprove other parts of said proceedings; and * * * the court shall correct all the errors in the assessment, apportionment and distribution of costs as above provided, and render a final decree approving and confirming all of the said proceedings * * * "

A judgment of the district court in affirming the proceedings of the irrigation district in entering into a contract with the United States to supply water to irrigate lands within the district and to provide for the joint construction of a drainage system, is not res judicata, so far as the assessment of benefits to the lands within the district is concerned, and does not preclude statutory proceedings for such assessment.

The dominant purpose of our irrigation district law is to facilitate the economical and permanent reclamation of our arid lands, and it must be the constant aim of judicial construction to effectuate that purpose so far as consistent with the whole body of our law. The continued existence of an irrigation district depends upon its ability to furnish water to landowners within the district. The stability and efficiency of the district as a quasi municipal corporation also depends upon the power to construct proper drainage within its limits. In the absence of either the right to furnish an adequate water supply or to construct an effective drainage system, the very purpose and object of the district would be thwarted, and the growth and development of the state retarded to its seri-
229 ous detriment.

The contract in question provides, among other things, that "The District agrees to distribute the amount of water delivered to it by the United States under this contract in full compliance with the provisions of said Reclamation Act of June 17, 1902, and the rules and regulations thereunder, and to use and distribute the same only upon the lands within the District, and in compliance with the provisions of Section 2 of the Act of Congress of February 21, 1911, (36 Stat. L. 925) known as the Warren Act."

Sec. 5 of the Reclamation Act of June 17, 1902, supra, among other things, provides: "No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land * * * "

Sec. 10 of said act provides: "That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

The secretary, in order to carry out the purposes of the reclamation act and in pursuance thereof, issued a general reclamation cir-

cular during the year 1909, and reissued said circular from time to time, the last being on February 6, 1913. In this circular, the secretary of the interior fixed a limit of residence in the neighborhood of said land at a maximum of fifty miles, and further provided that this limit of distance may be varied depending on local conditions. This circular also restricted the right to the use of water obtained from a government project by any one landowner to 160 acres of irrigable land.

230 The act of congress of February 21, 1911, known as the Warren Act (36 Stat. at L. 925), in section 2 provides: That in carrying out the provisions of said reclamation Act and Act amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes: * * * Provided further, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: * * * "

The act of congress passed August 13, 1914, known as the Reclamation Extension Act, sec. 7, provides:

"That the Secretary of the Interior is hereby authorized, in his discretion, to designate and appoint, under such rules and regulations as he may prescribe, the legally organized water users' association or irrigation district, under any reclamation project, as the fiscal agent of the United States to collect the annual payments on the construction charge of the project and the annual charges for operation and maintenance and all penalties: * * * "

It will, therefore, be observed that the act of congress of February 21, 1911, known as the Warren Act, and the subsequent act of congress passed August 13, 1914, known as the Reclamation Extension Act, make no provision for residence upon the lands to be irrigated from the waters of a government project. The Acts of June

231 17, 1902, and of February 21, 1911, both provide, however, that water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate 160 acres. Consequently, any owner of land within a government project or an irrigation district cannot secure the use of water from a government project in excess of an amount sufficient to irrigate 160 acres, whether he owns more than that amount of acreage in such district or not.

The regulations of the secretary of the interior heretofore referred to, contain the following provision:

"Holders of more than 160 acres of irrigable land within a Reclamation Project must sell or dispose of all in excess of that area before they can receive water."

The contract proposed to be entered into between the United

States and the Nampa & Meridian Irrigation District, as before stated, provides that the district will distribute the water to the purchasers of water rights under the acts of congress and the regulations of the secretary of the interior, supra. This provision of the contract is strenuously protested against by appellants for the reason, as they contend, that a landowner within the district who owns land in excess of 160 acres would be forced to dispose of all the lands he possesses in excess of 160 acres, or suffer the consequences of being taxed for all his lands, yet be denied water for the same in excess of 160 acres. The restriction under the above regulation is to the use of the water. The landowner who has land in excess of 160 acres may permit the whole thereof to be assessed with a government water right rather than insist that only 160 acres be so assessed, as, although he might be able to secure only enough water to irrigate 160 acres for his own use, the balance of his land would
232 be provided with a permanent water right which he might dispose of within a reasonable time; or, upon the apportionment of benefits, it may be determined that none of his land would be liable to assessment of benefits for a water right, or that no greater portion of his land than 160 acres would be susceptible of irrigation and to the assessment of benefits.

There can be no doubt that congress has the power to restrict the right to the use of water furnished from government projects to 160 acres standing in the name of an individual, but we do not think that body would assume the authority to control the benefits which might be assessed to lands within an irrigation district organized under the laws of this state.

The United States, through the Reclamation Service, has at a great expense constructed the Boise Project, whereby it acquired for sale and distribution ample water for the proper irrigation of the lands under said project, as well as a surplus sufficient in amount to properly irrigate the arid lands and supplement the now inadequate supply of water within the Nampa & Meridian Irrigation District, and has offered to the irrigation district the right to the use of said surplus water under the stipulations contained in the proposed contract. Having the authority under the law to dispose of the right to the use of water thus acquired, it is in a position to fix the terms and conditions of its use, subject to the power of the court to assess benefits within the district.

We are, however, aware of no valid reason why we should anticipate the final action of the district court in assessing the benefits to landowners within the irrigation district who own land in
233 excess of 160 acres. To do so would, in effect, require the district court in this proceeding to definitely fix the benefits to be assessed at a stipulated sum and thus deprive each owner of the land within the district of the right which he has under the statutes of this state to prove that his particular lands would not be benefitted by reason of the application of water under the contract.

Should the district court reach the conclusion that a landowner who holds title to lands in excess of 160 acres receives no benefits, of that his benefits would be limited to only 160 acres or less of land,

the objection so strenuously urged against this provision of the contract would be untenable. That bein gtrue, it necessarily follows that the objection raised at this time to the authority of the irrigation district to enter into the contract with the government by reason of the fact that possibly a serious injustice may be done to landowners within the district who owns lands in excess of 160 acres before the assessment of benefits have been made, cannot be considered in this proceeding.

There are other objections than those we have discussed urged by counsel for appellants in opposition to the contract sought to be entered into between the Nampa & Meridian Irrigation District and the United States. However, although we have carefully considered each and every objection urged, we find that many of them are immaterial so far as this case is concerned and are not properly before us for determination at this time.

This case was tried in the district court upon the theory that this was a special proceeding brought for the express purpose of having the proceedings authorizing the Nampa & Meridian Irriga-
234 tion District to enter into the contract under consideration examined, approved and confirmed by the district court. Counsel for appellants have taken the position, and we think erroneously, that this action was brought not only for that purpose but also for the purpose of the apportionment of benefits under sec. 2399, Rev. Codes; and in order to raise this question they alleged in their answer affirmative matters involving it which were wholly immaterial and which should have been stricken from the answer. The cross-complaint and the answer to the cross-complaint were likewise immaterial and were subject to the same motion. The district court did not find upon any of these matters, for the reason that they were immaterial in this proceeding. We think that this conclusion reached by the trial court was correct.

The judgment of the lower court is affirmed. Costs are awarded to respondent.

Sullivan, C. J. concurs.

235 MORGAN, *J.* (concurring):

While I am in accord with the conclusion reached by the majority of the court, I am not in accord with this doctrine announced in the opinion: "There can be no doubt that congress has the power to restrict the right to the use of water furnished from government projects to 160 acres standing in the name of an individual * * *," and which is thus stated at the commencement of Sec. 9 of the syllabus: "Congress has the undoubted power to restrict the right to the use of water furnished from government projects to 160 acres standing in the name of any one land owner * * *."

By an act of congress known as the "Idaho Admission Bill" approved July 3, 1890, this state was admitted to the union. The preamble to that act is as follows:

"Whereas, The people of the Territory of Idaho did, on the 4th

day of July, 1889, by a convention of delegates called and assembled for that purpose, form for themselves a Constitution, which Constitution was ratified and adopted by the people of said Territory at an election held therefor on the first Tuesday in November, 1889, which Constitution is republican in form, and is in conformity with the Constitution of the United States; and,

"Whereas, Said convention and the people of said Territory have asked the admission of said Territory into the Union of States on an equal footing with the original States in all respects whatever. Therefore.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the
236 State of Idaho is hereby reclared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the Constitution which the people of Idaho have formed for themselves be, and the same is hereby accepted, ratified and confirmed." Rev. Codes of Idaho, Vol. 1, p. 53.

It will be observed that the constitution of the state of Idaho, which had theretofore been adopted by the people of the territory was by congress expressly accepted, ratified and confirmed. Sec. 1, Art. 15 of that constitution is as follows: "The use of all waters now appropriated or that may hereafter be oppropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law."

There is no room for question that it was the intention of the people of Idaho in framing and adopting the constitution, and of congress in accepting, ratifying and confirming it, that the sale, rental and distribution of all the waters within the state theretofore appropriated, or thereafter to be appropriated, should be and remain subject to the regulation and control of the state and not subject to the regulation or control of the United States.

This question appears to have been prematurely raised in this proceeding, and was not properly before the district court, nor is it
237 properly before this court for decision. My concurrence in the conclusion reached by the majority of the court with respect to this point is, therefore, based upon the view expressed in the following portion of the opinion: "We are, however, aware of no valid reason why we should anticipate the final action of the district court in assessing the benefits to land owners within the irrigation district who own land in excess of 160 acres."

238 In the Supreme Court of the State of Idaho.

NAMPA AND MERIDIAN IRRIGATION DISTRICT, Respondent,
vs.
JAMES G. PETRIE et al., Appellants.

Petition for Writ of Error.

To the Honorable Isaac N. Sullivan, Chief Justice of the Supreme Court of the State of Idaho:

Now come the above named appellants, James G. Petrie, Oliver O. Haga, R. F. Blucher, and the other appellants appearing in said cause, and complain and allege:

That they now are and during all the times hereinafter mentioned were citizens of the United States, and each of them is a citizen of the United States, residing in the State of Idaho, and each of them is a citizen of the State of Idaho.

That on the 20th day of November, 1915, the Supreme Court of the State of Idaho, that being the highest Court of law or equity in said state, rendered a judgment against your petitioners in the above entitled cause, which judgment became the final judgment of this Honorable Court in said cause on or about the 11th day of December, 1915.

That your petitioners, appellants in said cause, were and are aggrieved by said decision and final judgment, and particularly in this: That in said final judgment and the proceedings had
239 prior thereunto in this cause certain errors were committed to the prejudice of your petitioners; that the said final judgment and decision of the Supreme Court of the State of Idaho in said cause deprived your petitioners of rights, privileges and immunities secured to them, and each of them, under the Constitution and laws of the United States.

That in said action your petitioners claimed that a certain contract, or proposed contract, between the respondent, Nampa and Meridian Irrigation District and the United States, acting by and through the Secretary of the Interior, was null and void and not a binding or enforcible contract as to either of the parties thereto, and that said contract deprived your petitioners of their property without due process of law, and denied to your petitioners the equal protection of the laws contrary to the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and that the Secretary of the Interior was without power or authority to enter into such contract or to carry out the terms or provisions thereof, and that such contract and the statutes of the State of Idaho purporting to authorize said Nampa and Meridian Irrigation District to enter into such contract, were contrary to and inconsistent with the provisions of the Constitution of the State of Idaho and the laws, statutes and Constitution of the United States. That in and by such contract the Secretary of the Interior undertook and

agreed to construct a certain drainage system for said Nampa and Meridian Irrigation District, and to relieve said District, or certain land owners therein, of the burden or obligation created by a prior contract for the purchase of water rights for certain lands
240 in said District from what is known as the Boise Project constructed by the United States under the act of Congress known as the Reclamation Act, and under said contract the said Nampa and Meridian Irrigation District undertook and agreed on behalf of these appellants and certain land owners in said District to purchase water rights in said Boise Project at a cost of about $75 per acre, and to charge the cost thereof to certain designated lands in said District. That the Supreme Court in its said final decision and judgment affirmed and approved said contract and held the same valid and finding and authorized by law; that such decision of this Honorable Court is against the title and right claimed by your petitioners, and, as they believe, contrary to the Constitution and statutes of the United States relating to the power and authority of the Secretary of the Interior to contract relative to the sale of water rights and the construction of drainage systems and to the distribution and control of water within a state, and it is further contrary to the Constitution and statutes of the United States relating to the dominion and control of irrigation districts over lands held by your petitioners in fee simple absolute under patent from the United States, and over water rights obtained and acquired under the laws of the State of Idaho and the Constitution and laws of the United States, all of which will more fully appear by referring to the record and proceedings in said cause and from the assignment of errors filed herewith, and your petitioners claim the right to remove said judgment to the Supreme Court of the United States by Writ of Error, under Section 237 of The Judicial Code of the United States, because and for the reasons above set forth, and as will appear more fully from the said Assignment of Errors and by the record in said cause.

241 Wherefore, Your petitioners pray for the allowance of the Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Idaho, and the Judges thereof, to the end that the record in said matter may be removed to the Supreme Court of the United States, and the errors complained of by your petitioners may be examined and corrected by the Supreme Court of the United States, and the said judgment reversed and set aside; and your petitioners will ever pray.

J. G. PETRIE,
R. F. BLUCHER
AND OTHER APPELLANTS.
By J. B. ELDRIDGE,
Their Attorney of Record.
OLIVER O. HAGA,
In Propria Persona.

UNITED STATES OF AMERICA,
State of Idaho, ss:

Let the Writ of Error issue upon the execution of a bond for costs in the sum of $500.00/100, by the appellants.

Dated August 16th, 1916.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of Idaho.

241½ [Endorsed:] No. 2710. In the Supreme Court of the State of Idaho. Nampa & Meridian Irrigation Dist., Respondent, vs. James G. Petrie et al., Appellants. Petition for Writ of Error. Filed Aug. 16", 1916. I. W. Hart, Clerk. By E. G. David, Deputy. Richards & Haga, Boise, Idaho.

242 In the Supreme Court of the State of Idaho.

NAMPA AND MERIDIAN IRRIGATION COMPANY, Respondent,
vs.
JAMES G. PETRIE et al., Appellants.

Assignment of Errors Filed With Petition for Writ of Error.

Now come the above named appellants and respectfully submit that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Idaho in the above entitled cause there is manifest error in this, to-wit:

1. That said Supreme Court erred in holding, adjudging and deciding that the Secretary of the Interior had power and authority to enter into the contract between the United States and said respondent, Nampa and Meridian Irrigation District, involved in said action, and that the Secretary of the Interior had power and authority to carry out the terms and provisions of said contract to be kept and performed by the United States.

2. That the said Supreme Court erred in holding, adjudging and deciding that the said respondent, Nampa and Meridian Irrigation District, had power and authority to enter into the said contract involved in said action, between the United States and said respondent.

243 3. That said Supreme Court erred in holding, adjudging and deciding that said District did not by said contract and the proceedings to be had thereunder deprive these appellants of their property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. That said Supreme Court erred in holding, adjudging and deciding that said District did not by said contract and by the proceedings to be had thereunder deny to these appellants the equal protection of laws as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. That said Supreme Court erred in holding, adjudging and deciding that said District by said contract and the proceedings to be had thereunder did not violate the provisions of Section 10 of Article 1 of the Constitution of the United States prohibiting any state or municipal subdivision thereof from enacting any law or ordinance impairing the obligation of contracts.

6. That said Supreme Court erred in not holding, adjudging and deciding that said contract was ultra vires and void as to said District and in excess of its power and authority under the laws and Constitution of the State of Idaho and the Constitution of the United States, particularly the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting a state from depriving any person of his property without due process of law, and from denying to any person the equal protection
244 of the law, whereas, said District, under the terms of said contract, in effect confiscated the property of these appellants and deprived them of the use and enjoyment thereof in that it deprived appellants of their fee simple title absolute as to their respective lands and imposed against such lands the restricted provisions contained in the Act of Congress commonly known as the Reclamation Act, and the act supplementary thereto commonly known as the Warren Act, and further in that it attempted to annul and set aside valid appropriations of water owned or held by appellants either under appropriations made under the laws of the State of Idaho or under contracts with the Payette-Boise Water Users' Association.

7. That said Supreme Court erred in not holding, adjudging and deciding that the Secretary of the Interior was without power or authority to contract to bind the United States to do or perform the acts, conditions and covenants to be made, kept and performed by the United States under said contract.

8. That said Supreme Court erred in not holding, adjudging and deciding that said contract in effect confiscated the water rights, ditches and canals owned by the appellant, Oliver O. Haga, and thereby deprives said appellant of his property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 13 of Article 1 of the Constitution of the State of Idaho, and Sections 1 to 5 inclusive of Article 15 of the Constitution of the State of Idaho.

9. That said Supreme Court erred in not holding, adjudging and deciding that said contract was illegal and void and had not
245 been ratified or approved as provided by Section 3 of Article 8 of the Constitution of the State of Idaho, and particularly in this, that said contract combines three separate and distinct propositions, to-wit:

(1) A proposal for the construction of a drainage system;

(2) A proposal to relieve the so called "Wet Lands" in said District from an obligation under a former contract to purchase storage water for supplementing their present rights, at a cost of about $61 per acre;

(3) A proposal to purchase water rights for 44,060 acres of land within the boundaries of said District at $75 per acre, such water rights to be furnished and delivered either directly to said lands from the irrigation works of the United States or to said District for distribution to said lands, and the said appellants are for the reasons aforesaid denied the equal protection of the laws, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

10. That the Supreme Court erred in not holding, adjudging and deciding that said respondent, Nampa and Meridian Irrigation District, was by said contract subjecting appellants and their property within said District to the arbitrary exercise of the powers of government, and was creating an unjust and illegal discrimination between the land owners in said District and exercising its powers with an evil eye and an unequal hand and thereby depriving appellants of their property without due process of law, and denying to them the equal protection of the laws contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

246 11. That said Supreme Court erred in not holding, adjudging and deciding that the water attempted to be sold by the Secretary of the Interior to said Nampa and Meridian Irrigation District under said contract should be distributed to the land owners within said District according to the laws and Constitution of the State of Idaho and not in accordance with the rules and regulations of the Secretary of the Interior and the acts of Congress commonly known as the Reclamation Act and the Warren Act.

12. That said Supreme Court erred in not holding, adjudging and deciding that the Secretary of the Interior and the respondent, Nampa and Meridian Irrigation District, were without power and authority to impose upon appellants or their lands within said District limitations and restrictions contained in the said acts of Congress and the regulations of the Secretary of the Interior.

13. That said Supreme Court erred in not holding, adjudging and deciding that said contract deprives appellants of the free use and enjoyment of their property and of the liberty to contract with relation to their lands within said District and the purchase of water rights therefor.

14. That said Supreme Court erred in holding, adjudging and deciding that the said contract would be valid and binding and enforcible contract as to the remaining provisions thereof notwithstanding important and essential provisions thereof might be modified and changed by the Board of Directors of said District and by the District Court for the proper District in the assessment of benefits thereunder and in the confirmation of such assessments.

247 15. That the judgment and decision of said Supreme Court is repugnant to and in conflict with Section 10 of Article 1 and Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reasons aforesaid and particularly in this, that the laws of the State of Idaho as construed by said Court impair the obligation of contracts and deprive appellants of their property without due process of law, and deprive appellants of the liberty of

contract and the right to the free use and enjoyment of their property as the owners of a fee simple title absolute under patents from the United States, and deny to appellants the equal protection of the laws.

Wherefore, for the foregoing and other manifest errors appearing in the record, the said appellants pray that the judgment of the Supreme Court of the State of Idaho in said cause be reversed and set aside and held for naught, and that it be adjudged and decreed that said contract between the United States and the respondent, Nampa and Meridian Irrigation District, is null and void.

J. B. ELDRIDGE,
Attorney for Appellants, Residence: Boise, Idaho.
OLIVER O. HAGA,
In Propria Persona.

247½ [Endorsed:] No. 2710. In the Supreme Court of the State of Idaho. Nampa & Meridian Irrigation Dist., respondent, vs. James G. Petrie et al., Appellants. Assignment of Errors Filed with Petition for Writ of Errors. Filed Aug. 16th 1916. I. W. Hart, Clerk, by E. S. David, Deputy.

248 In the Supreme Court of the State of Idaho.

NAMPA AND MERIDIAN IRRIGATION DISTRICT, Respondent.
vs.
JAMES G. PETRIE et al., Appellants.

Bond.

Know All Men by These Presents, that we, James G. Petrie, Oliver O. Haga, R. F. Blucher, and the other appellants in said cause, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto Nampa and Meridian Irrigation District, a public corporation organized under the laws of the State of Idaho, respondent in the above entitled cause, in the sum of Five Hundred ($500.00) Dollars, to be paid to the said Nampa and Meridian Irrigation District, its successors and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of August, A. D. 1916.

Whereas, the above named appellants have prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho;

Now, Therefor-, the condition of this obligation is such that if the above named appellants, plaintiffs in error in such Writ, shall
249 prosecute their said Writ of Error to effect, and answer all costs that may be adjudged against them, if they fail to make

their plea good, then this obligation shall be void, otherwise to remain in full force and effect.

OLIVER O. HAGA,
For Himself and His Co-appellants.
AMERICAN SURETY COMPANY
OF NEW YORK,
By H. N. FALK, *Resident Vice President.*

Attest:
CHAS. M. KAHN. [SEAL.]
Resident Assistant Secretary.

Bond approved this 18th day of August, 1916.
ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court
of the State of Idaho.

Endorsed: Filed Aug. 18, 1916. I. W. Hart, Clerk, by E. S. David, Deputy.

250 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Nampa and Meridian Irrigation District, a Public Corporation of State of Idaho, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Idaho, wherein James G. Petrie, John F. Weirman, Leota P. Lamback, Rosina C. Brose, J. W. Brose, Florence Wilmot, Lafayette Boone, Mrs. William Little, William S. Fisher, John Julion, Mrs. D. M. Byers, A. G. Thompson, A. C. Hill, W. B. Milks, Willis F. Zetzsche, Georgiana Milks, Henry Lietz, Ida F. Mellinger, Alice M. Curtis, John Weidman, John U. Wuest, Marcella S. Pride, Isaac L. Keener, John A. Hulstrom, C. L. Haworth, J. A. Clayville, J. E. Smeed, Ralph Waits, Herbert Aldridge, John H. Waits, E. M. Jackson, George A. Worden, Newton Irish, George L. Myers, James R. Russell, Mrs. A. W. Drake, John Skillern, R. B. McPearson, Charles Story, H. Curtis, Frank Langer, F. F. Maxwell, Frank W. Warren, F. M. Nelson, M. F. Stewart, W. W. Atkinson, Diana Beseker, Justus C. Stearns, H. L. Randall, Ada A. Ulmer, W. A. Pine, C. Monlux, R. C. Crawford, C. Sergeant, G. A. Koger, Henry Jackson, Robert McKinnis, W. L. Thurman, Harry Vaughn, W.
E. Wines, H. Schwartz, George L. Crandall, C. H. Hunting-
251 ton, Ed. Ashley, E. F. Crawford, Mrs. M. L. Wines, Charles Wartman, John Henderlider, O. J. Folsom, C. F. Hartley, Rose Parkinson Company, Lewis Stott, George Cornish, S. H. Grondahl, J. F. McFarland, S. W. Shook, F. P. Garver, S. H. Nelson, E. Grosso, J. B. Cook, L. F. Abel, W. M. Moreland, D. T. Sullivan, George Muller, W. L. Walker, George McKinnis, A. A. Beasley,

G. A. Woodman, L. O. Snider, James C. Scott, Sophia Fowler, W. W. Darling, J. S. Boone, Myra L. Monteith, Victor Bernariom, O. W. Alger, R. M. Allumbaugh, William Lunstrum, C. L. Cox, D. I. Stover, A. Lunstrum, A. I. Michael, F. H. Brandt, Lewis W. Griffith, C. E. Gregory, C. N. Dietz, T. M. McClure, N. R. Jones, J. B. Russell, L. C. Russell, J. B. Lewis, Esther Halferty, Amelia A. Coffin, H. B. Illingworth, J. W. Lawler, Charles Drake, J. E. Smeed, L. N. B. Carpenter, W. A. Rankin, Henry Klee, Mary W. Allen, W. W. Briggs, Sarah E. Ash, Frank Martin, Chris Powell, Hester M. Sparkman, F. J. Garver, A. H. Eagleson & Sons, Ira Rohrer, A. F. Graves, E. C. Laughlin, Folsom & Martin, a co-partnership, A. R. Cruzen, Investment Company, a corporation, A. Goreczky, Oliver O. Haga, Hunt & Sweet, a copartnership, Charles C. Tobias, R. F. Blucher, Samuel S. Drake, Mrs. E. A. Drake, Georgia T. Yates and Martin Houcke, are plaintiffs in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Idaho this 18th day of August, 1916.

[Seal of Supreme Court, State of Idaho.]

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of Idaho.

Attest:
I. W. HART,
Clerk of Supreme Court of Idaho.
By E. S. DAVID, *Deputy.*

252 STATE OF IDAHO,
County of Ada, ss:

The undersigned attorney- of record for the defendant in error, Nampa and Meridian Irrigation District, in the above entitled cause hereby acknowledges service of the above citation.

Dated this 26 day of August, 1916.

HUGH E. McELROY,
B. E. STOUTEMYER,
Attorney- for Nampa and Meridian Irrigation District.

Endorsed: Filed on return, Aug. 28, 1916 I. W. Hart, Clerk, By E. S. David, Deputy.

252½ [Endorsed:] No. 2710. In the Supreme Court of the State of Idaho. Nampa and Meridian Irrigation Dist., Respondent, vs. James G. Petrie, et al., Appellants. Citation. Richards & Haga, Boise, Idaho. Filed on return Aug. 28" 1916. I. W. Hart, Clerk. By E. S. David, Deputy.

253 JAMES G. PETRIE et al., Plaintiffs in Error,
vs.
THE NAMPA & MERIDIAN IRRIGATION DISTRICT, Defendant in Error.

SUPREME COURT, STATE OF IDAHO, *ss:*

Authentication of Record.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing pages, numbered from I to IV, and from 1 to 253, inclusive, are a true, full and complete transcript of the records and proceedings in the case of James G. Petrie et al., Plaintiffs in Error, vs. The Nampa & Meridian Irrigation District, Defendant in Error, as follows, towit: Original Writ of Error; Copy of transcript on appeal from the District Court to the Supreme Court of Idaho; Journal Entries, relative to said cause in Supreme Court; Opinion of State Supreme Court; Stipulations of counsel, relative to record and exhibits; Original Petition for Writ and Order allowing same; Original Assignment of Errors; Original Citation; Copy of Bond; and I further certify that I transmit, as a part of said record and in accordance with the stipulation of attorneys relative thereto, the following designated original exhibits on file in my office in said cause: Petitioner's Exhibits A, B, C and D. Defendant's Exhibits 1 to 8 inclusive.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Boise, Idaho, this 10th day of October, 1916.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk, Supreme Court of Idaho.

254 In the Supreme Court of the United States, October Term, 1916.

No. 730.

JAMES G. PETRIE et al., Plaintiffs in Error,
vs.
NAMPA & MERIDIAN IRRIGATION DISTRICT, a Corporation, Defendant in Error.

Præcipe Designating Parts of Record Which Plaintiffs in Error Deem Necessary for the Consideration of Said Cause.

To the Clerk:

Please be advised that Plaintiffs in Error, relying upon the assignment of errors heretofore filed in said cause in connection with their petition for writ of error, do not deem it necessary for the

consideration thereof that the printed record should include more than the papers and parts of the record designated below, and you will, therefore, please include in such printed transcript of record the following, and no other, papers or exhibits, to-wit:

Citation, and acceptance of service.

Writ of Error.

Clerk's return on Writ of Error.

Amended petition filed March 31, 1915, and Exhibits "A," "B," "C" and "D" thereto attached.

255 You will omit Exhibit "E", but in lieu thereof insert the following:

"(Synopsis of Exhibit Inserted Pursuant to Præcipe).

EXHIBIT "E."

This exhibit is an estimate of the cost of the proposed drainage system, giving location of proposed ditches.

Estimated cost of drainage works within District.....	$501,383
Estimated cost of drainage works outside of District....	105,587
Total	$606,970
To be paid by Nampa & Meridian Irrigation District...	$266,000
To be paid by Government	291,000
To be paid by Pioneer Irrigation District.....	50,000
Total	$607,000"

Demurrer to Amended Petition, filed April 12th, 1915.

Order over-ruling Demurrer.

Answer and Cross-Complaint, but in lieu of the names of all defendants insert the following: James G. Petrie (and the other defendants named in the demurrer hereinbefore set forth).

Answer to Cross-Complaint.

Findings of Fact and Conclusions of Law.

Judgment.

In lieu of the testimony of George H. Bliss insert the following after the words "as follows:" (Mr. Bliss testified as to the location of what is known as the Southside or New York Canal, and that the dry lands in the Nampa & Meridian Irrigation District could be irrigated from said canal.)

In lieu of the testimony of Joseph L. Burkholder insert after the words "as follows", the following: (Mr. Burkholder testified as to the indications of seepage on the lands of the Nampa & Meridian Irrigation District and as to the necessity for drainage, and that

256 in November, 1913, 2,700 acres in said District were being injured by lack of drainage.

Insert testimony of O. O. Haga.

Insert testimony of F. E. Rose (pages 185 to 194 of record in Supreme Court).

Insert testimony of J. W. Brose.

Insert testimony of J. A. Remington (Ff. 564 to 573, Pp. 197-200. Page and folio number of record in Idaho Supreme Court).

Insert testimony of F. E. Rose on page 200.

Insert Notice of Appeal.

Assignment of Errors.

Bond on Writ of Error.

Petition for Writ of Error.

Order granting Writ of Error.

Clerk's certificate to Transcript.

The foregoing request requires that the following papers and parts of the record as certified to you from the Court below, be omitted from the printed transcript of the record, to-wit:

Paper entitled "Petition" filed with the Clerk of the District Court February 8th, 1915, being ff. 1 to 26, inclusive, on pages 1 to 10, inclusive, of the record in the Idaho Supreme Court.

Order dated October 8th, ff. 27 and 28, page 11. Demurrer to original petition, filed March 22nd, 1915, (Ff. 29 to 44, pages 12 to 17, inclusive).

Exhibit "E" to Amended Petition inserting synopsis thereof as above set forth.

257 Affidavit filed April 28th, 1915, relative to additional time in which to file answer (Ff. 184-185, P. 74).

Default entry, page 98 (Ff. 252-253).

Certificate of Clerk of District Court to Judgment Roll (page 116).

Testimony of George H. Bliss (Pp. 120 to 139), inserting synopsis thereof as above set forth.

Testimony of J. H. Lowell (Pp. 139 to 141).

Testimony of Joseph L. Burkholder (Pp. 141 to 156) inserting synopsis thereof as above set forth.

Testimony of Daniel Barker (Pp. 166 to 168).

Testimony of J. A. Remington at page 161.

Testimony of William L. Girard (Pp. 183-185).

Testimony of J. L. Burkholder (Pp. 200 to 202).

Testimony of J. A. Remington (P. 202).

Certificate of Reporter to correctness of Transcript of Evidence (P. 204).

Notice of Motion for new trial (Pp. 205 and 206).

Order overruling Motion for new trial (P. 207).

Præcipe for Transcript of Record on Appeal from District Court to Supreme Court of Idaho (P. 209).

Certificate to Record (P. 210).

Stipulation of attorneys to record (P. 211).

In lieu of the original exhibits certified to you by the Clerk of the Supreme Court of the State of Idaho and introduced in evidnce, you will please insert in the printed record the following explanatory statements relative to said Exhibits, to-wit:

Defendant's Exhibit No. 1 being a warranty deed from W. W.

Lynch and wife and L. L. Folsom and wife to Oliver O. Haga
258 dated April 29th, 1910, conveying to the said Oliver O. Haga the S. E. ¼ of Section 21 and the S. W. ¼ of Section 22, Township 3 North, Range 1 East, B. M., and appurtenant water rights, canals and ditches, for the consideration of $24,000.00.

Defendant's Exhibit No. 2, being a quit claim deed from W. W. Lynch and L. L. Folsom to Oliver O. Haga dated April 29th, 1910, conveying to said grantee water permit No. 9 issued by the State Engineer of the State of Idaho March 21st, 1903, for 3.2 cubic feet per second of the waters of Eight Mile Creek for use for irrigation purposes on the lands described in Defendant's Exhibit No. 1, and Water Permit No. 3256 issued by the State Engineer of the State of Idaho on the 4th day of November, 1907, for 16 cubic feet per second of the waters of Eight Mile Creek to be used for irrigation purposes on the lands described in Defendant's Exhibit No. 1 and other lands.

Defendant's Exhibit No. 3 being a deed from James B. Taylor to Oliver O. Haga dated November 29th, 1910, for Water Permit No. 9 issued by the State Engineer of the State of Idaho on March 21st, 1903, for 3.2 cubic feet per second of the waters of Eight Mile Creek to be used for irrigation purposes on the lands described in Defendant's Exhibit No. 1.

Defendant's Exhibit No. 4 being a certificate from the State Engineer of the State of Idaho dated November 8th, 1905, certifying that the works described in Water Permit No. 9 and required for carrying and conducting the waters appropriated thereunder to and upon the lands described in Defendant's Exhibit No. 1 had been completed.

Defendant's Exhibit No. 5 being Water License No. 9 issued by the State Engineer of the State of Idaho to Oliver O. Haga under date of January 25th, 1912, for 1.6 cubic feet per second of the waters appropriated under Permit No. 9 and showing that such water
259 had been beneficially applied for irrigation purposes on a portion of the W. ½ of the S. W. ¼ of Section 22 and the E. ½ of the S. E. ¼ of Section 21, Township 3 North, Range 1 East.

Defendant's Exhibit No. 6 being a certificate from the State Engineer of the State of Idaho dated January 8th, 1912, certifying that the works described in Permit No. 3256 had been completed so as to carry 4.7 cubic feet per second of the water appropriated thereby from the point of diversion on Eight Mile Creek in Section 34, Township 3 North, Range 1 East, to and upon the W. ½ of the S. W. ¼ of Section 22 and the S. E. ¼ of Section 21, Township 3 North Range 1 East.

Defendant's Exhibit No. 7 being a Notice of Appropriation of Water dated May 4th, 1901, made by James H. Grimmett for 4 cubic feet per second of the waters of Ten Mile Creek to be used for the irrigation of the S. E. ¼ of N. W. ¼ and N. E. ¼ of S. W. ¼ and the N. ½ of the S. E. ¼ of Section 32, Township 3 North, Range 1 East, being the lands now owned by the defendant R. F. Blucher.

This statement is filed pursuant to Paragraph 9 of Rule 10 of the Supreme Court of the United States.

J. B. ELDRIDGE,
Attorney for Plaintiff in Error.
OLIVER O. HAGA,
In Propria Persona.

Service of the foregoing statement and praecipe and receipt of copy thereof admitted this 31st day of [illegible]er, 1916.

[illegible] E. McELROY AND
[illegible]OUTEMYER,
Attorneys for Nampa & Meridian Irrigation [illegible] Defendant in Error.

260 [Endorsed] 730 [illegible]560

261 [Endorsed] File No. [illegible] Supreme Court U. S. October Term, 1916. Term No. [illegible] James Petrie et al., P. E., vs. Nampa & Meridian Irrigation [illegible] Designation by plaintiffs in error of parts of record to be [illegible] and proof of service of same. Filed No. 6, 1916.

Endorsed on cover: File No. [illegible] Idaho Supreme Court. Term No. 730. James G. Petrie, Oliver O. Haga, R. F. Blucher et al., plaintiffs in error, vs. Nampa & Meridian Irrigation District. Filed October 18th, 1916. File No. [illegible]560

Supreme Court of the United States

OCTOBER TERM, 1917

No. [redacted]47

JAMES G. PETRIE, OLIVER O. HAGA, R. F. BLAUCHER, ET AL, PLAINTIFFS IN ERROR,

vs.

NAMPA & MERIDIAN IRRIGATION DISTRICT,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF OF PLAINTIFFS IN ERROR ON MOTION TO DISMISS.

[redacted]

[redacted]

Supreme Court of the United States

OCTOBER TERM, 1917

JAMES G. PETRIE, OLIVER O. HAGA, R. F. BLUCHER, ET AL, PLAINTIFFS IN ERROR,

vs.

NAMPA & MERIDIAN IRRIGATION DISTRICT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF OF PLAINTIFFS IN ERROR ON MOTION TO DISMISS.

INTRODUCTORY.

The motion to dismiss falls clearly within the rule, that where it involves the examination of the entire record in order to determine whether the alleged independent ground is broad enough to sustain the decision of the State Court without regard to the decision of the Federal questions involved, the motion will be considered in connection with the hearing on the merits.

It should be noted, also, that the motion to dismiss was not made until more than a year and a half after the cause had been docketed in this Court, the transcript of the record printed, the brief of counsel for plaintiffs in error filed, and but a few days before the case would be reached for argument, and it would seem entirely proper, if the motion should be entertained at this late day, to tax against the defendants in error the costs which could have been avoided had the motion been promptly filed.

It is believed, however, that the motion is wholly without merit, and we pass now to a consideration of that question.

ARGUMENT

In determining the jurisdiction of this Court to review by Writ of Error the decision of the highest court of a State, two primary questions are involved:

1. Is the judgment final?
2. Did the State Court actually or constructively decide a Federal question?

The Judgment in Case at Bar is Final.

The judgment of the State Supreme Court is set out in full on page 70 of the record. It reads as follows:

> "This cause having been heretofore heard, submitted and taken under advisement by the Court, and the Court having fully considered the same, now on this day the cause was again called, and the decision of the Court is delivered by Justice Budge, to the effect that the judgment of the lower court be affirmed. It is therefore considered, adjudged and decreed by the Court that the judgment of the District Court of the Seventh Judicial District in and for the County of Canyon in the above entitled cause be and the same is hereby affirmed. Costs are awarded to respondent."

It will be noted that the cause was not remanded to the trial court for further proceedings, but the judgment which had been entered by that court *was unqualifiedly affirmed*. The judgment of the trial court will be found on pages 53 to 54 of the record. That judgment determines, among other things, that,

> "Wherefore, by reason of the law and the evidence and the findings aforesaid, it is hereby ordered, adjudged and decreed that each and all of the proceedings taken by the Nampa & Meridian Irrigation District * * * be and the same are hereby confirmed and approved and declared valid; and that the Payette-Boise Water Users Associa-

tion, Limited, has the power and authority under and by virtue of its corporate existence to execute such contract; and further that the United States of America has under the law the authority to execute said contract and that when said contract has been executed the same will be a valid contract and binding upon the parties thereto and the said contract will be a legal and valid obligation binding upon said District in the sums therein stated, and the execution thereof is duly authorized."

The judgment of the Supreme Court was the termination of the proceedings. It was the end of the cause. It settled the rights of the parties involved in the proceedings, and they are as conclusively bound by the judgment as it is possible to bind parties by any judgment. It is *res adjudicata* in all future proceedings. It binds not only the parties, but it is a judgment *in rem* and binds the lands owned by the parties within the boundaries of the defendant Irrigation District.

Oregon Short Line R. R. Co. *v.* Pioneer Irr. Dist., 16 Ida. 578.

Knowles *v.* New Sweden Irr. Dist., 16 Ida. 235.

Progressive Irr. Dist. *v.* Anderson, 19 Ida. 504.

Nampa & Mer. Irr. Dist. *v.* Brose, 11 Ida. 474.

The form of the judgment is controlling for the purpose of ascertaining its finality.

Norfolk & S. Turnp. Co. *v.* Virginia, 225 U. S. 264, 268; 56 L. Ed. 1082, 1085.

Louisiana Nav. Co. *v.* Oyster Com., 226 U. S. 99, 57 L. Ed. 138.

When the judgment of the highest Court of the State terminates the suit so far as the State courts are concerned, the judgment is subject to review on Writ of Error if it involves a Federal question.

Tippecanoe Co. *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822.

Mower *v.* Fletcher, 114 U. S. 127, 29 L. Ed. 117.

To hold that the plaintiffs in error cannot prosecute a Writ of Error to this Court would absolutely deprive them of the rights guaranteed to them by the Federal Constitution and violated by the contract, which the Supreme Court of the State has held valid; for the questions determined in this cause cannot be reviewed in the proceedings which the District may later commence to have the assessment of benefits confirmed by the Court. That will be a new and independent action having no relation to the present suit, and matters determined in this suit cannot, as hereinbefore stated, be raised in that suit, but will be barred under the rule of *res adjudicata*. The present action was for the purpose of determining the validity of the contract between the District and the Secretary of the Interior, and on that point the judgment of the Supreme Court is final and conclusive. A land owner has no constitutional right to any other or further hearing upon that question.

Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 175.

> "Our jurisdiction is called in question upon the ground that the judgment is not final in the sense of Section 237, Judicial Code, upon which our power to review depends, because the judgment does not determine the merits and end the litigation. But, as this court has said, 'all judgments and decrees which determine the particular cause' are final in the sense of the statute. (Citing a number of decisions.) This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits."
>
> Detroit & M. R. Co. *v.* Michigan R. Com., 240 U. S. 564, 570-571, 60 L. Ed. 802, 807.

To the same effect are the decisions in Mount Vernon-Woodberry Cotton Duck Co. *v.* Alabama I. P. Co., 240 U. S. 30, 31, 60 L. Ed. 507, 510; Carondelet Canal & Nav. Co. *v.* Louisiana, 233 U. S. 362, 58 L. Ed. 1001.

The term "suit" as used in Section 237 and in the

former statutes is very comprehensive, "and is understood to apply to any proceeding in a court of justice which an individual pursues that remedy in a court of justice which the law affords him. *The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding, by which the decision of the court is sought, is a suit.*" (Italics ours.)

Weston *v.* City Council of Charleston, 2 Pet. 449, 7 L. Ed. 481.

Even where the proceedings are before administrative bodies, when an appeal is taken from such a body to the courts of the State, "such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other."

Upshur Co. *v.* Rich, 135 U. S. 467, 34 L. Ed. 196.

The case at bar was brought in the District Court of the State, a court of general original jurisdiction, and all the land owners in the District are under the law parties defendant to the proceedings, jurisdiction being obtained by the publication of an order or process, and "all parties are bound by the decree of confirmation", said the Supreme Court of Idaho in Progressive Irrigation Dist. *v.* Anderson, 19 Ida. 504, 511; and that Court has repeatedly held that the validity of the action taken by the district or the legality of the contract must be determined in the proceedings provided for the confirmation thereof, and a land owner who fails to claim his rights in such proceedings is forever thereafter barred from any adjudication thereof.

Oregon Short Line R. R. Co. *v.* Pioneer Irr. Dist., 16 Ida. 578, 589, 593-594.

That Court has further held "the organization and all proceedings under said act, (referring to irrigation dis-

trict law) up to and including the confirmation by the District Court of all such proceedings, are proceedings *in rem*, and the notices required to be given under the provisions of said act are sufficient to give each and every person interested in the organization of such district his day in court; and if he is not satisfied, he has the right to contest the matter in the District Court, and if not satisfied with the judgment of that court, he is given the right of an appeal to the Supreme Court. Thus are his rights amply protected."

Knowles *v.* New Sweden Irr. Dis., 16 Ida. 235, 245.

The decisions of this Court and of the highest Courts of the Western States having the so-called Wright Act, or Irrigation District Laws, are all to the effect that the confirmation proceedings are suits of a special but comprehensive character for the final determination of the rights of the land owners under the contracts or obligations entered into by the District, and for the purpose of determining the validity or bnding effect of contracts and obligations. Such acts are far more comprehensive than would be inferred from the meager quotations from the statute quoted in the brief of defendant in error in support of the motion to dismiss.

The scope of the hearing is governed by Section 2403 of the Idaho Revised Codes, which reads as follows:

> "Sec. 2403. Upon the hearing of such special proceedings, the court shall examine all of the proceedings set up in the petition, and may ratify, approve and confirm the same or any part thereof, and in case of a petition to confirm said assessment, list, apportionment and distribution, the court shall hear all objections either filed in said proceedings or brought up from the hearing before the board of directors as aforesaid, and for that purpose any person desiring to be heard upon objections overruled by the board of directors, shall state the substance of said objections and the ruling of the board in his answer. The court shall disregard every er-

ror, irregularity or omission which does not affect the substantial rights of any party, and if the court shall find that said assessment, list and apportionment are in any substantial matter erroneous or unjust, the same shall not be returned to said board, but the court shall proceed to correct the same so as to conform to this title and the rights of all parties in the premises, and the final order or decree of the court may approve and confirm such proceedings in part, and disapprove other parts of said proceedings; and in case the proceedings for the organization of the district and the issue of bonds are approved, the court shall correct all the errors in the assessment, apportionment and distribution of costs as above provided, and render a final decree approving and confirming all of the said proceedings. In case of the approval of the organization of the district and the disapproval of the proceedings for issuing bonds, the district shall have the right to institute further proceedings for the issue of bonds *de novo*. The costs of the special proceedings may be allowed and apportioned among the parties thereto in the discretion of the court."

The Idaho Supreme Court has repeatedly held that every question touching the validity of the proceedings, or the right of the land owner, that could have been set up under the statute is foreclosed by the judgment and that a land owner cannot seek a determination of such question in any independent proceeding, suit, or action, or in any subsequent proceeding brought by the district for determining the validity of some subsequent action or contract, even though it be based upon the proceedings previously confirmed.

Oregon Short Line R. R. Co. *v.* Pioneer Irr. Dist., 16 Ida. 578.

Knowles *v.* New Sweden Irr. Dist., 16 Ida. 235.

Progressive Irr. Dist. v. Anderson, 19 Ida. 504.

Federal Questions Involved.

A number of Federal questions are involved. They are specified in detail in the Assignment of Errors (Rec.

pp. 84-87) and are discussed at some length in the brief on the merits filed by plaintiffs in error. Briefly stated, they are:

1. That the contract in question (Rec. pp. 15-22) and the ordinance or orders of the Irrigation District approving the contract and the scheme of procedure contemplated thereunder impair the obligation of contracts, in that they annul all contracts previously entered into between the Payette-Boise Water Users Association and plaintiffs in error. (See discussion of this question in brief on the merits, pp. 43-45.)

2. That the contract denies to the land owners the liberty of contract. (For discussion of this question see pp. 46-47 of brief on the merits.)

3. The contract deprives plaintiffs in error of their property without due process of law, and denies to them the equal protection of the laws, in that the contract arbitrarily subjects the fee simple title absolute now held by plaintiffs in error to the burdensome and restrictive provisions of the Warren Act, and arbitrarily provides that they must take water at $75.00 per acre unless their present water rights are owned in certain designated ditches; and it totally ignores and disregards the water rights held by plaintiffs in error in other ditches, and acquired at great expense. (For discussion of this question see pp. 20-43 of brief on the merits.)

4. That the Secretary of the Interior was without authority to enter into a contract for the construction of drainage works for a municipal irrigation district.

5. That the contract deprives plaintiffs in error of their property without due process of law; it arbitrarily provides that the District shall loan to the Reclamation Service its taxing power, and that the taxes to be levied shall be determined by the Reclamation Service and by the contract in question. This is clearly an abuse of the taxing power and prohibited by Section 1 of the Fourteenth Amendment of the Federal Constitution. (For

discussion of this question see pp. 43-53 of brief on the merits.)

The Federal questions were raised by the pleadings and decided adversely to plaintiffs in error by both the trial court and the Supreme Court, and there does not seem to be the slightest foundation for the contention of defendant in error that the decision of the Supreme Court may be sustained on independent grounds. If the Federal questions had been decided in favor of plaintiffs in error there could not possibly be any theory or basis on which the contract could still be held valid. The validity of the contract was the *one question* before the Supreme Court of the State. Whether the proceedings of the District leading up to the execution of the contract were valid was merely incidental. The primary question was whether they were taken for a lawful purpose and for the purpose of entering into a valid and legal contract.

It would be most absurd to say that although the contract is fatally defective and invalid under the Federal Constitution the proceedings of the District are nevertheless legal, and that the court in the confirmation proceedings should not look into the contract or into the purposes for which the proceedings of the District were taken—obviously the important matter upon which the judgment of the court is desired. This was not the theory of the District when it filed its petition in the District Court whereby the present proceedings were initiated; it was not the theory upon which the case was decided in the Supreme Court, for that court passed upon the constitutional questions involved and affirmed, without modification, the judgment of the trial court.

The latter court found (Res. pp. 44-53) the facts in accordance with the contract. It found (Rec. p. 52) that in view of the new contract, "It will be no longer necessary that these lands should individually contract for water from the Government," and it therefore concluded

that the individual contracts should be annulled. It also found (Rec. p. 52):

> "That the Secretary of the Interior of the United States has approved the proposed contract with the Nampa & Meridian Irrigation District as to form and is ready to execute the same and proceed with the construction of the proposed works as soon as the legality and validity of the proposed contract with the Government has been affirmed by the Court."

And as conclusions of law (Rec. p. 53) it found and concluded that the District had lawful authority to enter into the contract, that the Payette-Boise Water Users Association had power to execute said contract, and it joined therein only for the purpose of annulling the individual contracts. It further found that the Secretary of the Interior had power to execute the contract, and it entered its decree accordingly (Rec. p. 53-54).

No non-Federal questions have ever been suggested in this case that would render the contract valid or the proceedings legal notwithstanding the Federal questions urged by plaintiffs in error, and it is inconceivable that any such questi can exist.

The suggestion of counsel that the decision could be sustained on independent grounds is not borne out by the judgment or opinion of the Supreme Court. It is true in this case the extent of the benefits that should be apportioned against each tract of land is not involved, except as the contract arbitrarily fixes the amount at $75.00 per acre without the consent of and without any hearing being afforded the parties for whom the water rights were purchased. It is also true that in the answer and cross-complaint filed by plaintiffs in error there are allegations touching the matter of benefits under the contract, but these were made largely for the purpose of showing more clearly the unreasonableness of the contract and for the purpose of emphasizing its invalidity and showing that the parties would be deprived of

their property without due process of law if the contract should be held valid and the District proceed in accordance with its terms which clearly it must be assumed it will do and must do if the contract is held valid.

It was alleged by plaintiffs in error that benefits would be apportioned in accordance with the contract and proof was offered to show (Rec. pp. 66-67) that the District had literally carried out the terms of the contract in making assessments, and had assessed the lands at $75.00 per acre for water rights without making any allowance for the water rights by which these lands were already being reclaimed and supplied with water.

In the cross-complaint plaintiffs in error sought to enjoin the District from proceeding under the contract and from executing the contract, and this proof was deemed important for the purpose of showing the irreparable injury that would result, and that the case had already gone beyond the mere apprehension of illegal action but had clearly reached the stage where the right to injunction could not be questioned.

This court in Vicksburg Water Co. *v.* Vicksburg, 185 U. S. 65, 46 L. Ed. 808, said:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

Counsel for defendant in error cites Tregea *v.* Modesto Irr. Dist., 164 U. S. 179, in support of the motion, but we respectfully submit that nothing said in that case can be held to support the motion to dismiss. But, on the contrary, that decision shows clearly that the court does have jurisdiction of the case at bar. On the matter of a Federal question being involved in a confirmation proceeding, such as we have in the case at bar, this Court said:

> "So there was considered by the Supreme Court of the State the distinct question of an alleged conflict between the proceedings confirmed by the decree of the lower court and rights claimed under the Constitution of the United States, and the decision was against those rights. Further, the real contention of the defendant was and is that the operation of this statute is to deprive him of property without due process of law. The burden of his case from the first has rested in the alleged conflict between proceedings had under the irrigation statute and the Federal Constitution, *so that beyond the express declaration in the opinion of the Supreme Court of the State, we may look to the real matter in dispute, and these unite in forbidding us to say that no Federal question was presented. The motion to dismiss on that ground must be overruled.*" (Our italics.)

The courts in that case did not shut their eyes to the *purpose* of the proceedings or whether the proceedings under review had been taken for the accomplishment of a *lawful purpose*. They did not limit the review to the simple question as to whether certain notices were given and elections and meetings held at the time and in the manner prescribed by the State statute, but they passed on the validity of the ultimate act and whether it came within the scope of the authority granted in irrigation districts. This Court, however, did decline to take jurisdiction on another ground, viz., that the bonds had not been sold and there was no evidence that they would

be sold, and any judgment that would be entered would not be binding upon or even notice to persons who might later purchase the bonds of the district, if issued after the Court declared them invalid.

But the matters suggested by the Court as necessary to give jurisdiction are all present in the case at bar, and none of the reasons sugested why the court should not take jurisdiction are present here. There the parties that would acquire the bonds, if sold by the district, were not before the court and would not be bound by the decision; whereas here the parties affected by the contract are all before the court. The judgment here is a judgment *in rem*, binding not only the present owners but their grantees and assigns forever.

The mere execution of the contract creates a cloud or encumbrance upon the title of the land owners, and the judgment declaring it valid and holding that the Secretary had authority to enter into it and that the restrictive and burdensome provisions of the Federal Act known as the Warren Act could be impressed on the title of plaintiffs in error, are finally determined by this proceeding and can be pleaded in bar in any other proceeding in which plaintiffs in error may seek to establish their rights. Besides, we have in this case a cross-complaint for an injunction enjoining the District from entering into the contract, so the grounds suggested as being wanting in the Tregea case are all present in the case at bar.

It is the rule that where on error to the Supreme Court of a State the record shows a decision of the State Court on a Federal question properly presented and of which the Supreme Court could take jurisdiction, and also the decision of a local question *the Writ of Error will not be dismissed on motion in advance of the hearing.* The parties are entitled to be heard on the soundness of the decision below on the Federal question, *on the sufficiency of that question to control the judgment in the whole case*, and on the sufficiency of any other

point decided to affirm the judgment even if the Federal question was erroneously decided.

Baltimore etc. R. Co. *v.* Maryland, 20 Wall. 643, 22 L. Ed. 446.

It appearing, therefore, that the judgment of the Supreme Court is final, that the decision, actually as well as constructively, decides a Federal question adversely to plaintiffs in error, that the decision cannot be sustained on grounds wholly independent of the Federal questions, that the decision is binding on all the land owners in the District and their grantees and assigns, and is in fact a judgment *in rem* and concludes the parties on all questions pertaining to the validity of the contract in question, the motion to dismiss should be overruled and denied and the cause heard on the merits.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.

Supreme Court of the United States

OCTOBER TERM, 1917.

No. [redacted]

JAMES G. PETRIE, OLIVER O. HAGA, R. F. BLUCHER, ET AL., PLAINTIFFS IN ERROR,

vs.

NAMPA & MERIDIAN IRRIGATION DISTRICT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF OF PLAINTIFFS IN ERROR.

[redacted]

INDEX

Page.

STATEMENT OF THE CASE 3-8
SPECIFICATION OF ERRORS 8-11
BRIEF OF ARGUMENT 11-20
ARGUMENT 20-53
Contract Amounts to Denial of Due Process and Equal Protection of the Laws 20-43
Secretary without Power to Enter Into Contract 42-43
This Contract Impairs the Obligation of Contract 43-45
The Contract Denies to the Land Owners the Liberty of Contract 46-47
Arbitrary Acts Amounting to Abuse of Taxing Power are Prohibited by the Federal Constitution 47-53
Allen vs. Jay, 60 Maine 124 14
Allgeyer vs. State of Louisiana, 165 U. S. 578, 41 L. Ed. 832 ..... 20, 46
Bank of Columbia vs. Okely, 4 Wheat. 235, 4 L. Ed. 559 ..... 12, 33
Beatrice vs. Wright County, 72 Neb. 689, 101 N. W. 1039 ..... 12, 42
Board of Comm'rs vs. Fullen, 111 Ind. 410, 12 N. E. 298 17
Brown vs. Denver, 70 Colo. 311, 3 Pac. 459 ..... 12, 42
Bush vs. Board of Supervisors, 159 N. Y. 212 13
Citizens Sav. & Loan Ass'n vs. Topeka, 87 U. S. 655, 22 L. Ed. 455 ..... 12, 13, 14, 15, 16, 36
Cole vs. LaGrange, 113 U. S. 1, 28 L. Ed. 896 14
Congressional Acts, June 17, 1902, 32 Stat. L. 388, Secs. 5 and 8 27
Congressional Acts, June 17, 1902, Sec. 4 29
Cooley on Taxation, (3d Ed.) p. 83, 84, 181 13
Cooley on Taxation (3d Ed.) p. 183 14

Page.
Cooley on Constitutional Limitations, p. 505..... 11
12 Corpus Juris, 990 .....19, 41
12 Corpus Juris, 1195 and 1196..... 11
12 Corpus Juris, 1200 .....20, 46
Fallbrook Irr. Dist. vs. Bradley, 164 U. S. 112, 41 L. Ed. 369.....13, 16, 17, 22, 23, 31
Gast Realty & I. Co. v. Schneider Granite Co., 240 U. S. 55, 60 L. Ed. 523.....15, 18, 51
Grand Trunk R. R. Co. vs. R. R. Commission of Indiana, 221 U. S. 400, 55 L. Ed. 786.....20, 45
Holden vs. Hardy, 169 U. S. 366, 42 L. Ed. 780... 11
Holland vs. Avondale Irr. Dist., 30 Ida. 479, 166 Pac. 259 41
Hone Tele. etc. Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510..... 11
Hooper vs. Emery, 74 Me. 375..... 14
Idaho Revised Codes, 1909, Sec. 2386.....24-25
Idaho Revised Codes, Secs. 2387, 2388..... 25
Idaho Revised Codes, Sec. 3240 24
Idaho Revised Codes, Sec. 2391 41
Jarrott vs. Moberly, 103 U. S. 580, 26 L. Ed. 492 13
Jenks vs. Stump, 41 Colo. 281, 15 L. R. A. (N. S.) 554, 93 L. Ed. 17.....12, 42
Kansas City vs. St. Louis S. F. R. R. Co., (Mo.) 130 S. W. 273, 28 L. R. A. (N. S.) 669..... 19
Kirwan vs. Murphy, 189 U. S. 35, 47 L. Ed. 698.. 18
Lowell vs. Boston, 111 Mass. 454, 461, 15 Am. Rep. 39 .....12, 14
Macon vs. Patty, 57 Miss. 378..... 17
Martin vs. District of Columbia, 205 U. S. 135, 51 L. Ed. 743.....15, 49
McCullock vs. Maryland, 4 Wheat, 431, 4 L. Ed. 579 12
Moffat vs. U. S., 112 U. S. 24, 28 L. Ed. 623..... 18
Morford vs. Unger, 8 Ia. 82..... 14
Myles Salt Co. v. Bd. of Comm'rs, 239 U. S. 478, 60 L. Ed. 392.....15, 18, 50

Page.
Nampa & Mer. Irr. Dist. vs. Brose, 11 Id. 171, 83 Pac. 499 ..... 5, 41
New Orleans Water Works Co. vs. La. Sugar Refining Co., 125 U. S. 18, 31 L. Ed. 607 ..... 19, 44
Norwood vs. Baker, 172 U. S. 269, 43 L. Ed. 443 ..... 15, 18, 47
Olcott vs. Fond du Lac County, 16 Wall. 278, 21 L. Ed. 382 13
Page & Jones, Taxation by Assessment, Sec. 16 .. 17
Page & Jones, Taxation by Assessment, Secs. 11, 117, 283-284 ..... 17, 34
Page & Jones, Taxation by Assessment, Secs. 417 and 418 19
People vs. Salem Twp. Board, 20 Mich. 452 14
Providence Sav. & Loan Assur. Soc. vs. Kentucky, 239 U. S. 103, 60 L. Ed. 167 ..... 20, 45
Reclamation Act, See Congressional Act, June 17, 1902 ..... 15, 16
State vs. Cornell, 53 Neb. 556 13
Swigart vs. Baker, 229 U. S. 187, 57 L. Ed. 1143. 43
Thomas vs. Gaines, 35 Mich. 155, 24 Am. Rep. 535 19
Union Ref. Transit Co. vs. Kentucky, 199 U. S. 194, 50 L. Ed. 150 18
Warren Act, Feb. 21, 1911, 36 Stat. L. 925, Sec 1, 2, 3, Chap. 141 ..... 16, 17
Waukegan vs. Burnett, 234 Ill. 460, 84 N. E. 1061 17
2 Willoughby on the Constitution, pp. 929-930 17
2 Willoughby on the Constitution, p. 934 18
Wright Act of California.
See Fallbrook Irr. Dist. vs. Bradley, *supra*.
Yick Wo. vs. Hopkins, 118 U. S. 345, 30 L. Ed. 220 ..... 16, 42

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 291

JAMES G. PETRIE, OLIVER O. HAGA, R. F. BLUCHER, ET AL., PLAINTIFFS IN ERROR,

vs.

NAMPA & MERIDIAN IRRIGATION DISTRICT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF OF PLAINTIFFS IN ERROR.

Statement of the Case.

The action involves the validity of a contract between the defendant in error (hereinafter called the "District"), the United States acting by and through the Secretary of the Interior, and the Payette-Boise Water Users Association (hereinafter called the "Association"). It is claimed by plaintiffs in error (about 150 land owners within the boundaries of the District) that neither the District nor the Secretary of the Interior have authority under the laws under which they are respectively acting to enter into the contract, and that the contract will deprive plaintiffs in error of their property without due process of law, deny to them the equal protection of the law, deprive them of the liberty of contract, and in many other ways deny to them the rights and privileges guaranteed by the Federal Constitution.

The proceedings were commenced by the District, which was organized under the irrigation district laws of Idaho, in many respects similar to the Wright Act of California, for the purpose of having it judicially determined and decreed that the proceedings of the District leading up to the execution of the contract were in all respects regular and that the contract would be valid and binding on the District, it being alleged that the Secretary of the Interior would not execute the contract until such determination has been made. Plaintiffs in error, who were defendants in the trial court, demurred to the petition and, upon the demurrer being overruled, filed answer denying the power and authority of the District and of the Secretary of the Interior to enter into such contract, and challenging the validity of the contract under the Federal Constitution; they also filed a cross-complaint, praying that an injunction be issued enjoining the District and its officers from entering into the contract and from carrying out any of the terms or provisions thereof.

The Trial Court found and decreed that the proceedings were regular and the contract in all respects valid (Rec. pp. 53 and 54). On appeal to the Supreme Court that tribunal held that the District was not authorized under the laws to proceed in accordance with the terms of the contract in certain important matters, but that as to those matters the District should follow the provisions of the district law and disregard the terms of the contract. In other respects it held the contract valid and that the District and the Secretary of the Interior had power and authority to enter into it. (28 Ida. 227, 153 Pac. 425.) From that decision the case was brought here for review on Writ of Error.

It appears from the pleadings and the exhibits thereto attached and the judicial history of the District, that the Nampa & Meridian Irrigation District was organized in February, 1904, (Rec. p. 4); that about the first of

January, 1906, it purchased an old and well-known irrigation system in the Boise Valley, known as the Ridenbaugh Canal, which was then furnishing, and for many years prior thereto had furnished, water to its entire capacity for approximately 22,612 acres (Exhibit "B," Rec. p. 15). The District, however, included in its boundaries upwards of 70,000 acres, of which 44,060 acres had no right to water from the Ridenbaugh Canal System, which is the only irrigation system owned or operated by the District. Upon the purchase of the Ridenbaugh Canal System by the District it obtained from the owners of the lands that could not be irrigated from that system "waivers" of their right to receive water from that system, or any system owned by the District, thereby forever releasing the District of all obligations to provide additional irrigation works or supply water for the 44,060 acres of lands, referred to in the contract in question as "project lands" (11 Idaho 474, 487).

The authority of the District to acquire the Ridenbaugh Canal System and confine its operations to the lands that could be irrigated from that system was confirmed by the Supreme Court of the State of Idaho in Nampa & Meridian Irrigation District vs. Brose, 11 Ida. 474, 83 Pac. 499. In those proceedings the District made it appear to the Court that the owners of the 44,060 acres not entitled to water from the Ridenbaugh Canal would obtain water from other sources and had relieved the District of all obligations to furnish such lands with water, and that such lands would not be assessed or taxed by the District but would for all purposes be considered as if they had been excluded from the District or were outside its boundaries.

After the rights of the respective parties had been thus confirmed by the Supreme Court of the State, and the District had confined its operations to the Ridenbaugh Canal System, the owners of lands not entitled to water from that system proceeded to acquire water

rights from other sources. Some acquired water rights in what was known as the New York Canal; some from the Settlers' Canal; some contracted with the Payette-Boise Water Users' Association, an organization formed for the purpose of co-operating with the Federal Government under the Reclamation Act of June 17, 1902, and for the purpose of taking over and operating the irrigation system to be constructed by the Government under that Act and collecting from the settlers on behalf of the Government the payments for water rights under that Act; and others made filings or appropriations of water under the State law and constructed ditches at their own expense.

From 1905 until 1914 the District took no step to supply water to or exercise any control over the 44,060 acres of land that had waived their right to receive water from the District. But by the contract now before the Court the District purchases from the United States, through the Secretary of the Interior, under the Reclamation Act and the supplementary Act commonly known as the Warren Act, water rights from the irrigation system constructed and operated by the Reclamation Service, at $75.00 per acre for all of the 44,060 acres, and expressly agrees that the cost of such water rights at the rate stated shall be assessed against said lands, and that no other lands in the District shall be liable therefor. The purchase is made with total disregard to any water rights and irrigation ditches already possessed by the owners of these lands, and without the acquiescence or consent of the owners, but by the District acting, as it were, under a power of attorney to make the purchase upon any terms and conditions satisfactory to the District and the Reclamation Service,—the District simply agreeing to use its "taxing power" to collect from the land owners the amount which the District and the Service have agreed among themselves that the owners shall pay.

The contract contains two further and independent

propositions, and presumably these propositions supply the inducement, so far as the District is concerned, for accepting the first proposition, viz., some of the lands in the District with old water rights from the Ridenbaugh Canal were in need of drainage and the Reclamation Service agreed not only to finance but also to take the contract for constructing the drainage works; it also appears that the owners of the old water rights under the Ridenbaugh Canal had shortly after the District was organized contracted with the Association to purchase supplemental water rights in the Government irrigation system then proposed to be constructed, which contracts provided that the old Ridenbaugh water rights should be valued at $14.00 per acre and the land owners were to pay for the supplemental rights the difference between that sum and the actual cost of a full water right in the Government irrigation system, which it was then estimated would cost about $25.00 or $26.00 per acre, making the cost of the supplemental right from $11.00 to $12.00 per acre. It developed, however, when the Government system was finally completed that the actual cost of a water right would be $75.00 per acre, thus leaving the cost of the supplemental right to the owners of the old Ridenbaugh rights about $61.00 per acre instead of $11.00 or $12.00.

The contract in question, seemingly as a consideration for the District taking the unexpected action of purchasing water rights for the 44,060 acres at $75.00 per acre, in total disregard of the owners' requirements, provides that the owners of the Ridenbaugh water rights shall be entirely released of their obligations to take supplemental water rights, and the drainage works which some of them needed would be built and financed by the Reclamation Service. The contract embracing these three distinct propositions was approved at an election in the District held for such purpose, at which election 1206 votes were cast in favor of the contract and 160 votes

were cast against it. Under the [illegible] any person living in the District, having the qualifications required of a voter at a general election, may vote at an irrigation district election, but a land owner living outside the boundaries of the District is not entitled to vote on district matters. The cities of Nampa and Meridian are within the boundaries of the District and the drainage works, as shown by the plans, were built for the benefit of the lands in the immediate vicinity of these places.

The contract in question attempts to set aside the contracts which many of the land owners had previously entered into with the Association for the purchase of water rights in the Government works under individual contracts, and under which many of the owners were claiming rights based upon the fact that when such contracts were entered into official [illegible] had been given and representations made that the water rights would cost about $25.00 or $26.00 per acre instead of $75.00 per acre, as demanded when the works were completed. The contract in question further provides that the owners of the 44,060 acres of patented land not entitled to water from the Ridenbaugh Canal "shall be subject to the same provisions as to residence, cultivation and limit of area as the lands of the Boise Project outside of the District" (Rec. p. 22), and that the provisions of the Reclamation Act and the Warren Act relative to the use and distribution of water, residence and right to water shall apply to these lands and the owners thereof. These restrictions are regarded as such as encumbrances by many of the land owners, and the right of the District to impose on the fee simple title of the owner the burdens and restrictions of the Federal Acts referred to is directly challenged.

Specification of Errors

The errors assigned upon the application for the Writ are set out in full in the printed record (pp. 84-87), and

for a more particular statement we beg to refer to such record. Briefly stated, they are:

1. That the Court erred in holding that the Secretary of the Interior had power and authority to enter into said contract or power or authority to carry out the terms and provisions thereof, to be kept and performed by the United States.

2. That the Court erred in holding and deciding that the District had power or authority to enter into said contract.

3. That the Court erred in holding and deciding that the District would not by said contract and the proceedings which it had agreed to take thereunder deprive plaintiffs in error of their property without due process of law, contrary to the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. That the Court erred in holding and deciding that the District would not by said contract deny to plaintiffs in error the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment.

5. That the Court erred in holding and deciding that the District by said contract and the proceedings to be had thereunder did not violate the provisions of Section 10 of Article I of the Constitution of the United States, prohibiting any state or municipal subdivision thereof from enacting any law or ordinance impairing the obligation of contracts, it appearing here that the existing contracts between the land owners and the Payette-Boise Water Users Association were to be cancelled and set aside without the consent of the land owners.

6. That the Court erred in not holding and deciding that the contract was *ultra vires* and void as to the District and in excess of its power and authority under the laws and Constitution of the State of Idaho and the Constitution of the United States, particularly under Section 1 of the Fourteenth Amendment, it appearing that said

contract in effect confiscates existing water rights and ditches owned by plaintiffs in error and deprives them of the use and enjoyment of their property by imposing on their present fee simple absolute title the burdens and restrictions of the Federal Acts prohibiting any person from receiving water for more than 160 acres, and from receiving water for any of his land if he does not reside in the vicinity thereof.

7. That the Court erred in not holding and deciding that the contract had not been properly ratified and approved by the people of the District, in that the voters were not permitted to vote upon the separate and distinct propositions submitted but were compelled to vote for all or none of said propositions, to-wit: (1) Proposal for the construction of a drainage system; (2) proposal to relieve the lands under the Ridenbaugh Canal from an obligation under a former contract to purchase supplemental water rights from the Government system at a cost of about $61.00 per acre; and (3) a proposal to purchase water rights for 44,060 acres at $75.00 per acre, the cost of such water rights to be assessed exclusively against said lands, and the District to lend the Government the use of its taxing powers for the collection of the maintenance charges as well as the cost of the water rights.

8. That the Court erred in not holding and deciding that the District by and under the contract in question was arbitrarily visiting upon the plaintiffs in error the powers of government unrestrained by the established principles of private rights and distributive justice, and was creating an unjust and illegal discrimination between the several classes of land owners in the District and exercising its taxing powers and powers of contract with an evil eye and an unequal hand, and depriving plaintiffs in error of their property without due process of law and denying to them the equal protection of the laws.

9. That the Court erred in not holding and deciding that the water to be delivered to the land owners in said District under said contract should be distributed to such land owners according to the laws and Constitution of the State of Idaho, and not in accordance with the rules and regulations prescribed by the Secretary of the Interior and the Acts of Congress commonly known as the Reclamation Act and the Warren Act.

10. That the Court erred in not holding and deciding that the District was without power to impose upon plaintiffs in error and their lands the limitations and restrictions contained in the said Acts of Congress and the regulations of the Secretary of the Interior.

11. That the Court erred in not holding and deciding that said contract deprives plaintiffs in error of the liberty of contract with relation to their lands within said District, and for the purchase of water rights therefor, and deprives them of the use and enjoyment of their property.

12. That the Court erred in holding and deciding that, notwithstanding many of the provisions of the contract could not be carried out by the District, the said contract would still be valid and binding and had been properly authorized and approved by the voters of the District, although such approval was obtained on the theory that the contract would be carried out according to its terms and not as modified by the decision of the Supreme Court.

Brief of the Argument.

The guaranties of due process of law extend to every governmental proceeding which may interfere with personal or property rights, whether the proceeding be legislative, judicial, administrative or executive.

Home Telephone etc. Co. *vs.* Los Angeles, 227 U. S. 278, 57 L. Ed. 510.

Holden *vs.* Hardy, 169 U. S. 366, 42 L. Ed. 780.

Cooley on Constitutional Limitations, 505.

12 Corpus Juris, 1195-1196.

This provision was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia *vs.* Okely, 4 Wheat. 235, 4 L. Ed. 559.

The constitutionality of the statute is tested—not by what is done under it, but by what it authorizes to be done.

Beatrice *vs.* Wright County, 72 Neb. 689, 101 N. W. 1039.

Jenks *vs.* Stump, 41 Colo. 281, 15 L. R. A. (N. S.) 554.

Brown *vs.* Denver, 70 Colo. 311, 3 Pac. 459.

Of all the powers conferred upon government that of taxation is most liable to abuse. The power to tax is the power to destroy.

Citizens Sav. & Loan Ass'n *vs.* Topeka, 87 U. S. (20 Wall.) 655, 22 L. Ed. 455.

McCulloch *vs.* Maryland, 4 Wheat. 431.

The right of municipal corporations to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

Citizens Sav. & Loan Ass'n *vs.* Topeka, *supra.*

Where money is sought to be taken by the State from an individual by the exercise of the power of taxation in any form, or however that power may be defined, it must be for the purpose of expenditure for *a public object or use*, and the test must necessarily be the essential character of the direct object of the expenditure proposed.

Lowell *vs.* Boston, 111 Mass. 454, 461, 15 Am. Rep. 39.

Great as is the power of any sovereignty to levy and collect taxes from its citizens, that power in a constitutional country has very distinct and positive limitations. Some of these inhere in its very nature, and exist, whether declared or not declared, in the written constitution; but some of them it is not uncommon to specify, either out of abundant caution, or to keep them fresh in the minds of those who administer the government.

Cooley on Taxation (3d Ed.) p. 83.

It is the first requisite of lawful taxation, that the purpose is one for which a tax may be laid. In other words, it is a public purpose. But the determination of the legislature on this question is not, like its decision on ordinary questions of public policy, conclusive either on the other departments of the Government, or on the people. The question, what is and what is not a public purpose, is one of law; and though unquestionably the Legislature has large discretion in selecting the object for which taxes shall be laid, its decision is not final.

Cooley on Taxation (3d Ed.) p. 84.
Bush *vs.* Board of Supervisors, 159 N. Y. 212.
State *vs.* Cornell, 53 Neb. 556.

It is implied in all defenses of taxation that taxes can be levied for public purposes only. Differences of opinion frequently arise concerning the power to impose taxation in particular cases, but all writers and jurists agree in the fundamental requirement that the purpose shall be public, and they differ, when they differ at all, upon the question that the particular purpose proposed is within the requirement.

Olcott *vs.* Fond du Lac County, 16 Wall. 678.
Citizens Sav. & Loan Ass'n *vs.* Topeka, 87 U. S. 655, 22 L. Ed. 455.
Jarrott *vs.* Moberly, 103 U. S. 580.
Fallbrook Irr. Dist. *vs.* Bradley, 164 U. S. 112.
Cooley on Taxation (3d Ed.) p. 181.

It is generally admitted that the legislative determination of what is a public use for taxation purposes is only to put the administrative machinery of the State in motion; but when the power of the State is made use of to compel submission by the individual, he has always the right to invoke the protection of the fundamental law which raises a judicial question upon which the courts cannot refuse to pass judgment. It has been forcibly said that an unlimited power in the legislature to make any and everything lawful which it might see fit to call taxation, would, when plainly stated, be an unlimited power to plunder the citizens.

Citizens Sav. & Loan Ass'n *vs.* Topeka, 87 U. S.. 655, 22 L. Ed. 455.
Cole *vs.* LaGrange, 113 U. S. 1.
Morford *vs.* Unger, 8 Ia. 82.
People *vs.* Salem Twp. Board, 20 Mich. 452.
Hooper *vs.* Emery, 14 Maine, 375.
Allen *vs.* Jay, 60 Maine, 124.
Cooley on Taxation (3d Ed.) p. 183.

The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is in its essential character a private and not a public object.

Lowell *vs.* Boston, 113 Mass. 454, 15 Am. Rep. 39.
Citizens Sav. & Loan Ass'n *vs.* Topeka, *supra.*

The contract is not an obligation on the part of the District. The District simply purports to act as the broker or agent for a number of persons owning lands within its boundaries, and it undertakes to bind them, severally and independently, to pay the Government $75.00 per acre for water rights for their respective tracts of land, regardless of whether they need the water or not. By the contract the *District simply loans its taxing power to* the Reclamation Service and agrees,

through its taxing power, to levy against these lands such *maintenance charges* as the Reclamation Service *may demand*, in addition to the annual installments of the purchase price. It imposes on the lands of these individuals the restrictions and burdens of the Federal Reclamation Act and the Warren Act. It stipulates that although the land owners must pay the taxes and assessments levied, they cannot receive the benefit of their water rights for more than 160 acres, and for that amount only in the event they are actual bona fide residents on such land, or occupants thereof residing in the neighborhood. It denies to the land owners the right to purchase water rights by private contract. It denies them the right to participate in the negotiations and annuls private or individual contracts previously entered into by many of the land owners.

The arbitrary and unauthorized purchase by the District of water rights for individual land owners, to be delivered by the Reclamation Service direct to such land owners and not through the works of the District, at the excessive price stated in the contract and under the burdens and restrictions of the Reclamation Act and the Warren Act, is an abuse of the law and not a due exercise of the taxing power.

Norwood *vs.* Baker, 172 U. S. 269, 43 L. Ed. 443.
Citizens Sav. & Loan Ass'n *vs.* Topeka, 87 U. S. 655, 22 L. Ed. 455.
Martin *vs.* District of Columbia, 205 U. S. 135, 51 L. Ed. 743.
Myles Salt Co. *vs.* Board of Comm'rs, 239 U. S. 478, 60 L. Ed. 392.
Gast Realty & I. Co. *vs.* Schneider Granite Co., 240 U. S. 55, 60 L. Ed. 523.

There is no community of interest in the water rights purchased by the District for individual land owners in severalty. No pro-rating of water is permitted. No title or ownership was vested in the District, and the land

owners are not permitted to lease or dispose of the water to others. They can only receive *not to exceed* what they actually need. The contract under the circumstances was not for the acquisition of property to be used by the District for a public use, and no tax can be levied for carrying out the purposes of the contract.

Fallbrook Irr. Dist. *vs.* Bradley, 164 U. S. 112, 162, 41 L. Ed. 369, 390.

No public necessity required the purchase by the District of water rights in severalty for certain land owners in the District. The land owners could have themselves contracted for the water if they needed it or desired it on the terms demanded by the Reclamation Service. The District seemingly traded the rights of these land owners for the provision in the contract releasing the holders of old water rights in the District from an obligation of $61.00 per acre to the Reclamation Service under an old contract entered into before the cost of water rights had been ascertained, and also for the agreement on the part of the Reclamation Service to construct a drainage system for the District, charging less than half of the cost to the lands that can be reclaimed from the irrigation system owned by the District. It shows clearly the necessity for a government of law under which the minority can be protected from the despotism of the majority.

Citizens Sav. & Loan Ass'n *vs.* Topeka, 87 U. S. 655, 22 L. Ed. 455.

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo *vs.* Hopkins, 118 U. S. 345, 30 L. Ed. 220.

The validity of the irrigation district law has been sustained by this court on the ground that the expenditure required for the construction of necessary irrigation works was too great for individual effort, and that the undertaking was one of such magnitude and importance that the credit of the entire community could be legally used in the furtherance of the object. But that reason wholly fails in this case, for no new works were constructed and no additional property acquired by the District through the purchase of water rights for certain individuals. The community credit was not used and no property vested in the land owners *jointly*, as was the case under the Wright Act of California, which, for the reasons stated above was upheld by this court in Fallbrook Irr. Dist. vs. Bradley, 164 U. S. 112, 162, 41 L. Ed. 369, 390.

The municipality is not the agent of the land owner in the making of public improvements.

Bd. of Comm'rs *vs.* Fullen, 111 Ind. 410, 12 N. E. 298.

Page & Jones on Taxation by Assessment, Sec. 16.

Due process of law requires that the assessment be levied for *a public use.*

Page & Jones on Taxation by Assessment, Secs. 11, 117, 283-284.

2 Willoughby on the Constitution, p. 928.

A special assessment is like a tax in that it is imposed under authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax in that *it must be levied for a public purpose and must be apportioned by some reasonable rule* among those upon whose property it is levied.

Macon *vs.* Patty, 57 Miss. 378.

2 Willoughby on the Constitution. pp. 929-930.

It must be levied according to benefits and upon all property benefited by the improvement.

Union Refrigerator Transit Co. *vs.* Kentucky, 199 U. S. 194, 50 L. Ed. 150.

A special assessment is *prima facie* invalid which casts upon abutting property the cost of an improvement without reference to the benefits received.

2 Willoughby on the Constitution, p. 934.

Norwood *vs.* Baker, 172 U. S. 269, 43 L. Ed. 443.

When the contract is of such a character that there can be no reasonable presumption that substantial justice will be done under the methods pursued in making the assessments for benefits, but the possibility is that the parties will be taxed disproportionately to each other and to the benefit conferred, the proceedings will be held invalid as depriving a person of his property without due process of law.

Gast Realty & I. Co. *vs.* Schneider Granite Co., 240 U. S. 55, 60 L. Ed. 523.

Martin *vs.* District of Columbia, 205 U. S. 135, 139, 51 L. Ed. 743.

Myles Salt Co. *vs.* Bd. of Comm'rs, 239 U. S. 478, 60 L. Ed. 392.

Norwood *vs.* Baker, 172 U. S. 269, 43 L. Ed. 443.

Public agents are but servants of the law and they cannot bind the Government beyond the terms of the statute under which they act.

Moffat *vs.* U. S., 112 U. S. 24, 28 L. Ed. 623.

Kirwan *vs.* Murphy, 189 U. S. 35, 47 L. Ed. 698.

The Reclamation Service has no authority under either the Reclamation Act or the Warren Act to contract with an irrigation district for the construction of its drainage works, or to construct such works when not required for the drainage of lands being reclaimed by the Federal Government.

Where property cannot be benefited by the proposed improvement, such as drains, except subsequent work be done to connect the lands with such drains, and for which extension no provision is made, the property cannot be specially assessed for such drain until it is benefited thereby.

Waukegan *vs.* Burnett, 234 Ill. 460, 84 N. E. 1061.
Kansas City *vs.* St. Louis S. F. R. R. Co., (Mo.) 130 S. W. 273, 28 L. R. A. (N. S.) 669.
Page & Jones on Taxation by Assessment, Secs. 417 and 418, and cases there cited..

An assessment levied by an arbitrary standard which requires the burden to be levied upon lands, far from drains and only slightly benefited, equally with those fronting upon it and greatly benefited, is not just and equal or in proportion to benefits and is unconstitutional.

Thomas *vs.* Gaines, 35 Mich. 155, 24 Am. Rep. 535.

The Secretary of the Interior cannot add to the cost of water rights under the Reclamation Act or the Warren Act the cost of building drainage works in possible anticipation of future needs, when the lands receive no immediate benefit therefrom.

A by-law, ordinance, or order of a municipal corporation may be such exercise of legislative power delegated by the legislature to the corporation as may properly bring it within the meaning of the provision of the Constitution prohibiting any State from passing any law impairing the obligation of contracts. And the power to determine what persons and property shall be taxed is strictly a legislative power.

New Orleans Water Works Co. *vs.* La. Sugar Refining Co., 125 U. S. 18, 31 L. Ed. 607.
12 Corpus Juris, 990.

The annulment by the District of the outstanding water contracts entered into by individual land owners in the District with the Reclamation Service falls under the constitutional provision forbidding any act in violating the obligation of contracts.

Grand Trunk R. Co. *vs.* Railroad Commission of Indiana, 221 U. S. 400, 55 L. Ed. 786.

Providence Sav. & Loan Assur. Soc. *vs.* Kentucky, 239 U. S. 103, 60 L. Ed. 167.

The right to make contracts between individual land owners with reference to their property and the purchase of water rights, and to farm, use, and enjoy their property, although they may not be occupants of the land or residents in the neighborhood, is both a liberty and property right and is within the protection of the guaranties against the taking of liberty or property without due process of law.

Allgeyer *vs.* State of La., 165 U. S. 578, 41 L. Ed. 832.

12 Corpus Juris, 1200.

Argument.

The contract now before the Court stands as the supreme limit to which public corporations invested with taxing power have so far gone in the abuse of that power. It cannot be seriously claimed that the contract was entered into for the accomplishment of a public object or for a public purpose. The District gratuitously assumes the authority of a broker or agent for the owners of the 44,060 acres of land, with unlimited power to purchase water rights for them, severally and individually, and fix the amount they shall pay therefor, the obligations, encumbrances and restrictions they must assume as to residence and the acreage they may farm and own. We think the contract stands without a parallel in reported cases. The provisions that the claim of the seller for the purchase price shall be limited and

confined to what may be realized out of the particular lands for which water rights are bought, and that the cost of the water shall be apportioned by the District as benefits at the stipulated sum of $75.00 per acre, when the Board later is required by the statutes to determine and apportion the benefits, and that it will loan to the seller its taxing power as an aid in the collection of both the purchase price and the maintenance charges are clearly a perversion of the power of taxation.

The very absurdity of submitting to voters, who have no interest in the matter and who are not to pay the tax, the question whether the District shall purchase, at the sole expense of such owners, water rights for certain individual land owners, who have waived their right to water from the District and who have a right to contract individually for such water, if they desire it or need it, at once challenges attention. Why should those who have no interest either in the land or in the water or in the crops that will be raised on these lands, or in the distribution of the water to the lands, in fact not the slightest obligation or concern in the matter, pass upon the important question as to whether these land owners should buy water from the Reclamation Service upon terms which the land owners themselves have declined to approve? And why should the District constitute itself the agent of these land owners for such purpose? It seems, indeed, a case of a public corporation gone mad.

The Idaho Irrigation District law is very similar in its general scope and purposes to the Wright Act of California, which was fully considered by this Court in Fallbrook Irrigation District vs. Bradley, 164 U. S. 112, 41 L. Ed. 369. The special features, however, which the Court pointed out as saving that Act from falling under the constitutional inhibitions urged against it are entirely wanting in the case at bar. In that case the District had been organized for the purpose of accomplish-

ing the construction of works that would reclaim a large tract of arid land; the enterprise was of such magnitude that it could not be undertaken by individual effort; bonds had been issued and taxes levied for the construction of the necessary works. The legal basis for the formation of such Districts with taxing power, appears in the following statement from the decision (p. 163):

> "If it be essential or material for the prosperity of the community, and if the improvement be one in which all the land owners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners or by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit."

We are not in this case challenging the right of the State to provide for the organization of irrigation districts. The question here is simply the right of the District and the Secretary of the Interior to enter into the particular contract before the Court and to tax the lands of plaintiffs in error, as provided in that contract. The plan does not call for the building of new works. The irrigation district had years before purchased the only irrigation works which it intends to acquire. Plaintiffs in error had released the District from providing water for them, and they were acquiring what water they needed by their own efforts and by their own means and by individual contracts in which they had a direct voice as to the amount of water to be furnished and the terms and conditions upon which it should be furnished. The purchase of a water right by the District for Mr. Haga

and Mr. Blucher and others similarly situated, to be delivered by the Reclamation Service through its works, and to be paid for by them, severally and independently, and not by the District or the voters or other land owners of the District, is certainly not an improvement "in which all the land owners have to a certain extent a common interest", as stated by this Court in the Fallbrook case; and in view of the fact that all the irrigation works referred to in the contract and required under it had already been constructed, it cannot be said that the contract was necessary in order to accomplish the improvement or the construction of necessary works. The public "improvement", the accomplishment of which the law deems of sufficient importance to permit the organization of these taxing districts, had already been constructed, and the water rights purchased by the District could be purchased by the individuals themselves, if they were willing to submit to the restrictions and terms contained in the contract.

An additional reason pointed out by the Court in the Fallbrook case for holding that the improvement was a *public* improvement, or for a public use or purpose, was that under the Wright Act then before the Court, quoting from the decision (p. 162):

> "All land owners in the District have the right to *a proportionate share of the water*, and no one land owner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public that every resident in the district should have the right to the use of the water. The water is not used for general, domestic, or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. *Nevertheless, if it should so happen that at any particular time the land owner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus or the whole of the water as he may choose.*" (Our italics.)

None of the reasons given by the Court in the above quotation as showing that the improvement was for a public use exist under the Idaho statutes, and the contract now before the Court provides the very opposite of what this Court considered essential in the above case before the use or improvement could be said to be of such a public character that the District could invoke its taxing power in furtherance of the enterprise. The Idaho statutes do not provide for assignment of the water if the land owner does not need it. On the contrary, Section 3240 expressly provides that:

> "The right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied."

And Section 2386, with reference to the use and distribution of water by irrigation districts, provides that:

> "Section 2386. Said board shall have the power to manage and conduct the business and affairs of the district, make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required, and prescribe their duties; and to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land as may be necessary and just to secure the just and proper distribution of the same. Said by-laws, rules and regulations must be printed in convenient form for distribution throughout the district. The board and its agents and employees shall have the right to enter upon any land to make surveys, and may locate the necessary irrigation works and the line of any canal or canals, and the necessary branches for the same, on any lands which may be deemed best for such location. Said board shall also have the right to acquire, either by purchase, condemnation or other legal means, all lands and water rights, and other prop-

erty necessary for the construction, use and supply, maintenance, repair and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, and all necessary appurtenances. In case of purchase, the bonds of the district hereinafter provided for may be used to their par value in payment. Said board may also construct the necessary dams, reservoirs and works for the collection of water for said district and do any and every lawful act necessary to be done that sufficient water may be furnished to each land owner in said district for irrigation purposes. The use of all water required for the irrigation of the lands of any district formed under the provisions of this title, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this title, is hereby reclared to be a public use, subject to the regulation and control of the State, in the manner prescribed by law. * * * "

Section 2387 of the Code reads as follows:

"Section 2387. The legal title to all property acquired under the provisions of this title shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this title. Said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided."

And Section 2388 provides:

"Section 2388. The said board is hereby authorized and empowered to take conveyances or other assurances for all property acquired by it under the uses and provisions of this title, in the name of such irrigation district, to and for the purposes herein expressed, and to institute and maintain any and all actions and proceedings, suits at law and in equity, necessary or proper in order to fully carry out the provisions of this title, or to enforce, main-

tain, protect or preserve any and all rights, privileges and immunities created by this title, or acquired in pursuance thereof. In all courts, actions, suits or proceedings the said board may sue, appear and defend, in person or by attorneys, and in the name of such irrigation district."

The foregoing are the only provisions of the Idaho statutes bearing upon the relation of the land owners or water users to the irrigation works and water rights constructed or acquired by an irrigation district, except the provision that the district shall only be organized so as to include *"lands susceptible of one mode of irrigation from a common source and by the same system of works."* (Section 2372), as did the original Wright Act before the Court in the Fallbrook case.

The statute clearly contemplates that the land owners should have an undivided and proportionate interest in the works and water rights; but the contract provides for the very opposite. It provides that the water shall be delivered to certain land owners direct from the irrigation works of the Reclamaation Service, hence such land owners can have nothing whatever in common with the District or the other land owners in the District. Much of the land is so located that water therefor cannot be delivered through the works owned or controlled by the District. Such land owners receive no benefit from the District, but are subject to its taxing power, which it agrees in the contract to exercise not in accordance with the benefits received but so as to collect from the land owner a flat charge of $75 per acre on account of principal and the amount the Reclamation Service may request on account of maintenance. We have the anomalous situation of the taxing authorities contracting that an *outside agency shall determine the amount of the tax levy.*

Surely these novel views of the taxing power must find some check in the Constitution. It applies to the

individual the rule of autocracy and bureaucracy with a vengeance. It would seem that it cannot in fairness be called taxation—it is more akin to extortion.

The contract (Rec. p. 19, par. 11) provides that while the land owners are required to pay $75.00 per acre for the water they shall receive, no definite quantity or amount is assured the settler, but he shall in all cases be limited to "*not more*, however, than is needed for beneficial use on said lands." It will be noted also that the contract totally disregards the fact that many of the land owners have acquired water rights at great expense from other sources, and hence will require but little water to supplement their present rights. There is, therefore, a total disregard of benefits and the arbitrary apportionment against each acre of land of the enormous charge of $75.00 per acre. And in addition to this, and the heavy penalties provided by the statutes for delinquent taxes the *land owner can receive no water whatever, while he is delinquent.* The contract further provides that "the project lands in the District shall be subject to the same provisions as to residence, cultivation and limit of area as the lands of the Boise Project outside of the District." The restrictions referred to will be found in the Act of June 17, 1902, (32 Stat. L. 388), viz., (Sec. 5):

> "No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made."

And further, (Sec. 8):

> "That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the lands irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

The foregoing restrictions as to residence and ownership are such that some of the land owners must immediately dispose of their lands. Those who hold over 160 acres, although required to pay the tax on their entire acreage, cannot receive water for more than 160 acres, and then only in the event "he is an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land." Should he remove from the locality he cannot retain his farm. He must either sell it or pay the tax without receiving the water. In case of sale the market is limited to individuals who have the qualifications stated in the Act. He cannot rent the water or sell it to others, as this Court said could be done under the Wright Act, for here it is expressly made "appurtenant to the land irrigated," that is, to the land for which the District bought the water; and he is entitled to no definite or specific amount of water, for "beneficial use shall be the basis, the measure, and the limit of the right." Hence, he can at most receive what is necessary to supplement his existing right, notwithstanding he has been compelled to pay the enormous price of $75.00 per acre and had his title encumbered by the restrictions referred to.

We submit that there can be no authority for a public corporation without the consent of the individual forcibly impressing upon his fee simple title the restrictions of the Reclamation Act.

The contract shows with reasonable certainty the motives which led to its approval. The Reclamation Service had constructed a large irrigation system and reservoir. In the inception of the project it had secured stock subscription contracts from land owners to the Payette-Boise Water Users Association (Exhibit C, Rec. pp. 23-26). At the time these subscription contracts were entered into the estimated cost of the water right was about $25.00 or $26.00, and the land owners very generally (but not all) signed such contracts. When the works

were completed it was claimed that the actual cost would be somewhere from $75.00 to $80.00 per acre. The land owners were in many cases contesting, or preparing to contest the right of the Reclamation Service to hold them to their contracts in view of the enormous increase in the cost. It was claimed that the estimate made of the cost of water rights when the contracts were signed and the project was undertaken was the amount contemplated by Section 4 of the Act, wherein it is provided that:

> "The said charges shall be determined with a view of returning to the Reclamation fund the *estimated* cost of construction of the project, and shall be apportioned equitably."

While there was abundant land that could not obtain water from any other source and on which the water from the Government Project could be used without any loss to the Government, employees of the Reclamation Service, ambitious to make a showing and to forcibly and effectively suppress those who were objecting to the increased cost, conceived the ingenious scheme of invoking or reviving the latent powers of the Nampa & Meridian Irrigation District over the 44,060 acres of land within the boundaries of that District, but not entitled to water from its irrigation system and the owners of which had released the District of all obligation to supply water for such lands; but to make a sufficient inducement to those who controlled the affairs of the District it was proposed to embody two other propositions in the contract, some of the voters being interested in one and some in the other.

In the vicinity of the city of Nampa and the town of Meridian, both having a substantial voting population, there were certain comparatively small tracts needing drainage, and to satisfy the demands of those communities for drainage the Reclamation Service proposed that the Government would go into the contracting business and agree to construct a drainage system to drain such

lands, placing a large part of the cost of such drainage works on the owners of the 44,060 acres, although substantially none of such lands would be benefited in the slightest degree by such drainage works. For, manifestly, if there were arid and needed water for irrigation they would not be suffering from too much water to the extent of needing drainage.

To arouse the interest of the land owners whose lands were being irrigated from the old irrigation system, which the District had purchased in 1905, it was proposed to relieve such land owners from a contract entered into about the same time that the stock subscription contracts had been entered into (Exhibit C, Rec. p. 23). The contracts with the land owners under the old irrigation system provided that they should purchase supplemental water rights from the Reclamation Service at the estimated cost, less a credit of $11.00 per acre, which was the estimated value of the rights they then held in the Ridenbaugh Canal System (Rec. pp. 10, 22, 51). In view of the fact that the Reclamation Service was at the time of the proposed contract (1914) claiming that the cost of the Government water rights would be at least $75.00 per acre, the owners of land having old water rights would be compelled to pay about $61.00 per acre for the supplemental right instead of $11.00 or $12.00, as originally estimated. With these inducements before them, the Board of Directors of the District recommended the contract in its present form, containing the three propositions, and especially providing that the cost of the new water rights should be charged exclusively to the owners of the 44,060 acres, who are not entitled to water from the irrigation system owned by the District, and that less than half of the cost of the drainage system should be charged to the old water right lands that would be benefited by drainage.

It is alleged in the petition, and found by the Court, that the contract containing three separate and inde-

pendent propositions was submitted to the voters of the District at an election called for such purpose, although there was no authority under the Idaho statutes for submitting any such contract to a vote of the people; and it is conceded that at such election the voters were compelled to vote either "Contract—Yes" or "Contract—No." They had no opportunity to vote for or against any one or two of the three propositions. The fact of an election having been held lends no force to the contract and does not deprive plaintiffs in error of any of their constitutional rights. The election was mere camouflage. Clearly neither the District officers nor the District nor the electors of the District had been commissioned by the owners of the 44,060 acres to purchase water rights for their lands upon terms which they did not approve, but for which they could themselves have purchased the water if they needed it.

The contract attempts to annul the outstanding stock subscription contracts (Exhibit "C," Rec. p. 23) without the consent of the land owners who had executed the contracts. It annuls and suppresses the defenses and rights acquired under such contracts. It is in effect a "wholesale" rescission of such contracts by those who were not parties to it, although the Association, which was organized at the instance of the Reclamation Service, seems to acquiesce in the annulment of the contracts. But none of these parties represented the land owners or had any authority to speak for them.

By the contract in question the *District contracts away its discretion in the apportionment of benefits.* The hearings provided for by the Idaho statutes for the apportionment of benefits become mere idle form, for the terms of the contract had been agreed upon by the parties to it and it cannot be assumed, as did the Idaho Supreme Court, that the District is going to violate its contract and proceed according to the statute; and as conclusive evidence on that point we call attention to the construc-

tion placed on the contract by the District officers, who at the time of the hearing in this case had apportioned the benefits and *in every case they were apportioned in strict accordance with the letter of the contract.* (Rec. p. 67). They assessed against the lands of Mr. Haga *$20,371.04*, which was at the rate of $75.00 per acre for 240 acres, plus drainage (although the land is about five miles from the nearest drain) and reservoir water on an additional 80 acres entitled to water from the Ridenbaugh Canal; they assessed against the lands of Mr. Blucher *$7,475.00*, which was at the rate of $75.00 per acre for his land (Rec. p. 67). This shows the construction placed upon the contract by the District and the manner in which it proposes to carry it out.

We think the language of Mr. Justice Matthews, in the opinion of this Court in Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220, applies with peculiar force to this contract and to the rights of plaintiffs in error. In answer to the contention that the ordinance on its face was not discriminatory or illegal, he said:

> "This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against the particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions

> of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The record contains only the evidence with reference to a few of the rights which are taken as representative of the others. The undisputed evidence of Mr. Haga is to the effect that he owns 320 acres, of which 80 acres are irrigated from the Ridenbaugh Canal, and for the remaining 240 acres he has acquired water rights under the laws of the State, through Permits and Licenses issued by the State Engineer; and he, and his predecessors in interest, have constructed ditches at great expense to conduct the water appropriated on and over the land he owns (Rec. pp. 54-64). He has a stock subscription contract covering forty acres of his land and would take a small amount of reservoir water as an insurance during the low water season to supplement his existing rights. The contract in question and the District in the apportionment of benefits *totally ignored the water rights and ditches which he has acquired.* The same is true in the case of Mr. Blucher (Rec. pp. 64-66), and the undisputed evidence of the witnesses Brose and Rose shows that the Blucher land has for many years been irrigated from an independent water right furnishing an abundance of water for the land in question.

The contract and the acts of the District under it are certainly the arbitrary exercise of the powers of Government, unrestrained by the established principles of private rights and distributive justice.

> Bank of Columbia *vs.* Okely, 4 Wheat, 235, 4 L. Ed. 553.

The purchase of the water rights for individual land owners was not in the furtherance of a public object or for the accomplishment of a public enterprise which could not be consummated without collective or community effort.

Fallbrook Irr. Dist. *vs.* Bradley, 164 U. S. 112, 162, 41 L. Ed. 369, 390.

Page & Jones, in their work on Taxation by Assessment, in discussing the nature of the improvement for which assessment according to benefits may be made, say (Secs. 283, 284):

> "The elements which an improvement must possess in order to be one for which a local assessment may be levied based on the theory of benefits, are certainly two in number, and possibly three. (1) In order to justify local assessment the improvement must be a *public one;* that is, it must be one which confers a *general benefit upon the public at large,* and which, therefore, the public acting through its government may construct without the consent of the particular individuals affected thereby. Local assessment for benefits is a form of taxation and the very nature of taxation implies that it is for a public interest. An improvement which lacks this element is essentially a private improvement, and no matter how useful or advantageous it may be, the public cannot compel its construction, nor can it pay therefor by funds raised by general taxation. Being a private improvement it must be left to the judgment and voluntary consent of the owners of the private property affected thereby. 'The power to make special assessments is referable to and included in the taxing power. * * * Even the owner of the land benefited cannot be taxed to improve it unless public considerations are involved, but must be left to improve it or not as he may choose.' (Elmore vs. Drainage Comm'rs, 135 Ill. 269.) Thus a statute providing an assessment for making connection with the sewer system put down by a private contractor is invalid. * * * (2) In order to justify a local assessment, the improvement must not only be

public in its nature, but it must confer an especial and local benefit upon the property which is to be assessed therefor. * * * Without such local benefit the improvement may be public in character, so that the expense thereof may be borne by general taxation, but a local assessment, based upon the theory of benefits, cannot be levied therefor. (3) A third element which is said in some jurisdictions to be essential is that of *permanency.*" (Our italics.)

In the case at bar no visible improvement is acquired under the assessment or tax. The land owner under the express provisions of the contract and the statutes expressly made a part thereof receives simply the *abstract right to demand water* from the works constructed by the Reclamation Service; *provided,* (1) *he does not own more than 160 acres;* and *provided,* (2) *he is not in default in the payment of his taxes for either principal or maintenance;* and *provided,* (3) *he is "an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land."* The *amount of water* he shall receive is not fixed at any specific quantity. It is anywhere from nothing to "*not more,* however, than is needed for beneficial use on said land"—presumably to be determined by the ditch rider and not by the owner of the land. This abstract right thus acquired, and of which the land owner may have the benefit if he has the qualifications prescribed by statute and has been able to pay his taxes promptly, may at any time be forfeited, for under Section 5 of the Reclamation Act "no such right shall permanently attach until all payments therefor are made."

The tax must be paid even though the owner is disqualified from receiving the water. He must pay the tax, although he can receive no benefit from the alleged improvement. In such cases the contract must necessarily lead to an *enforced sale* of the land. It would seem that it would be far more appropriate to authorize a tax for making physical improvements on the prop-

erty, such as durable, well-constructed and ornamental fences and farm buildings, and to stock the farms with livestock, so necessary for permanent farm husbandry and for maintaining the fertility of the soil. From such improvements it may be said the public receives some indirect benefit, whereas it can receive no benefit from taxing a man for an abstract right to water, which he is not permitted to enjoy because he has not the qualifications prescribed by the Federal Act. But such taxes are obviously unconstitutional.

The case is somewhat similar to one where a city in purchasing a municipal water plant should enact that the same should be paid for by the lot owners in proportion to the areas of their respective lots, but forbidding any lot owner from receiving water for more than a five-room house and only then in the event he was an actual bona fide resident of the house, "or occupant thereof residing in the neighborhood." Clearly the restrictions imposed exceed all bounds, and we cannot conceive of a greater abuse of the taxing power than is contemplated by this contract.

What was said by this Court in Citizens Savings & Loan Association vs. Topeka, 87 U. S. (20 Wall.) 655, 22 L. Ed. 455, seems especially pertinent to the case at bar. The court had before it an act of the Legislature of the State of Kansas permitting towns to issue bonds and contract debts for building bridges, aiding railroads, water power and other works of internal improvement, under which the City of Topeka had issued bonds to encourage a company in the manufacture of iron bridges in that city. The Court, after considering the constitutional authority for investing public corporations with the power to contract and incur debts for improvements which were not essentially public in their character, said:

> "It follows that in this class of cases *the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to*

pay the debt, the contract itself is void for want of authority to make it.

"If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the Legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose." (Our italics.)

The Court then refers to the contest over railroad aid bonds and to the fact that many of the courts had held that such bonds were really issued for a public purpose, as railroads were essentially of a public character although constructed by individual enterprise, and then adds:

"We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State Legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right. (Citing authorities.)

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. Whiting vs. Lond du Lac, 25 Wis. 188; Cooley, Const. Lim. 129, 175, 487; Dill. Mun. Cor. Sec. 587.

"*Of all the powers conferred upon government that of taxation is most liable to abuse.* Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of people. It was said by Chief Justice Marshall, in the case of McCulloch vs. Maryland, 4 Wheat. 431, that *the power to tax is the power to destroy.* A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National Banks, drove out of existence every state bank of circulation within a year or two after its passage. *This power can as*

readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay, with one hand, the power of the government on the property of the citizen, and with the other bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

"Nor is it taxation. 'A tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state.' 'Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes.' Cooley, Const. Lim. 479.

"Coulter, J., in Northern Liberties vs. St. John's Church, 14 Pa. St. 104, says, very forcibly, 'I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose.' See, also, Pray vs. Northern Liberties, 31 Pa. St. 69; Matter of Mayor of N. Y., 11 Johns., 77; Camden vs. Allen, 2 Dutch 398; Sharpless vs. Mayor, *supra;* Hanson vs. Vernon, 27 Ia. 47; Whiting vs. Fond du Lac, *supra.*

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

"It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax, to see that it is not so used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are

> assessed fall upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." (Our italics.)

Under the irrigation district law of Idaho the apportionment of benefits becomes a permanent assessment roll on which taxes for general district purposes may be levied, and those whose lands have been assessed at $75.00 per acre must forever continue to pay a proportionately larger sum of general district taxes than the owners of the old water rights. The record does not clearly show the cost of the old water rights per acre, but it is alleged in the petition filed by the District for the confirmation of its proceedings (Par. XVI, Rec. p. 10) that at the time the Payette-Boise Reclamation Project was undertaken the owners of the old rights (during the years 1905 and 1906) contracted with the Reclamation Service, through the Payette-Boise Water Users Association, for supplemental water on the basis of the old water rights having a value of $14.00 per acre. The apportionment of the cost of the purchase of the Ridenbaugh Canal was made about the same time, so the estimate of the value of the rights is presumably somewhat near the amount that was assessed against the lands having old water rights on account of the purchase of the Ridenbaugh Canal.

The decision of the Supreme Court of the State in the suit confirming the organization of the District and the purchase of the Ridenbaugh Canal (Nampa & Meridian

Irrigation Dist. vs. Brose, 11 Ida. 474, 83 Pac. 499) states that the District had authorized the issue of bonds to the amount of $583,505.00 for the purchase *and enlargement* of what is known as the Ridenbaugh Canal System, the enlargement being for the purpose of providing water for the 44,060 acres of dry lands. Hence it may be assumed a substantial part of the bond issue was expected to be used for that purpose, and such is, in fact, the case. As shown by the decision of the State Supreme Court in that case, the enlargement of the system was abandoned and the benefits were only apportioned for the actual cost of the Ridenbaugh Canal. We have, therefore, after the present contract was entered into, an apportionment of benefits against all the lands in the District $75.00 per acre for 44,060 acres, and about one-fifth of that amount per acre against the lands in the District having old water rights.

Section 2391 of the Idaho Revised Codes provides that:

> "Section 2391. The board of directors may, at any time when in their judgment it may be advisable, call a special election and submit, to the qualified electors of the district, the question whether or not a special assessment shall be levied for the purpose of raising money to be applied to any of the purposes provided in this title. (Then follows provision for calling election.) At such elections the ballots shall contain the words 'Assessment—Yes' or 'Assessment—No.' If two-thirds or more of the votes cast are "Assessment—Yes' the board shall immediately levy an assessment sufficient to raise the money voted."

The Supreme Court of the State of Idaho, in a very recent decision—Holland vs. Avondale Irr. Dist. 30 Ida. 479, 166 Pac. 259—in construing this statute holds that the assessment must be levied on the *basis of the apportionment of benefits;* hence any sum raised by the District for general district purposes under special assessments will fall about five times as heavy per acre on the owners of the 44,060 acres as it does on the owners of

the old water rights, who are in fact receiving substantially all the benefits from the district organization and from the maintenance and operation of its irrigation system.

The constitutionality of the statute is tested not by what is done under it, but by what it authorizes to be done.

Beatrice *vs.* Wright County, 72 Neb. 689, 101 N. W. 1039.

Jenks *vs.* Stump, 41 Colo. 281, 15 L. R. A. (N. S.) 554.

Brown *vs.* Denver, 70 Colo. 311, 3 Pac. 459.

Secretary Without Power to Enter Into Contract.

There seems to be no basis in the Federal Statutes for the Secretary of the Interior entering into the contract in question, particularly insofar as it makes the Reclamation Service the *contractor for the construction of drainage works for the district.* The contract is unceremoniously left to the Reclamation Service without public notice or call for bids. The drainage system is to cost $557,000.00, of which the District agrees to pay $266,000.00. The balance is to be charged against the 44,060 acres and other lands in the Boise Project, without regard to the fact of whether such lands may ever require drainage. It is a *present charge and tax* imposed on lands for drainage works not required at this time and from which no benefit whatever is received, and in fact may never be received by the lands that have to bear the charge.

The Secretary of the Interior has no authority under the statutes under which he is acting to build drainage works under such circumstances and add the cost thereof to the cost of the irrigation works, and make it a charge against the lands to be irrigated. Neither does the law contemplate that the Secretary in dealing with irrigation districts should deal with them simply as brokers or agents for the land owners and accept anything less

than the *obligation of the District as a whole*, and the District should apportion the benefits in accordance with the laws of the State and not according to the contract with the Secretary.

Public agents are but servants of the law and they cannot bind the Government beyond the terms of the statute under which they act.

This court held, in the case of Charles H. Swigart et al, vs. D. P. Baker, 229 U. S. 187, 57 L. Ed. 1143, that it was proper to refer to House Report No. 1468 from the Committee on Irrigation of Arid Lands, made by said House Committee on the passage through Congress of what is known as the Reclamation Act for the purpose of arriving at the intention of Congress with respect to what was contemplated by said Reclamation Act. On page 9 of said Report, we find the following language:

> "While the bill will, it is confidently expected, furnish a sufficient sum to construct the larger irrigation works required in the arid region, it is not expected or contemplated that the work constructed by the Government will include anything but reservoirs and the main canals, leaving, even under the systems constructed by the Government, all of those diversion and distribution works which may be constructed by individual or co-operative effort to be so constructed. Further, the bill is intended to supplement rather than usurp the domain of private and co-operative enterprises."

It will be seen from the foregoing that Congress did not contemplate and did not have under consideration when said law was enacted the building of drains in irrigation districts which had already been formed and the lands of which were in private ownership.

The Contract Violates the Obligation of Contracts Clause of the Federal Constitution.

The contract between the District and the Secretary has the force and effect, so far as the District and the tax payers thereof are concerned, of a legislative act or

order within the meaning of Section 10 of Article 1 of the Federal Constitution, prohibiting any State from passing any law impairing the obligation of contracts. It is claimed by the District that the contract has been approved by its Board of Directors and by the people of the District at an election held for that purpose, and that a tax must be levied from year to year in accordance with the terms of the resolution and order of the Board authorizing the execution of the contract. The contract expressly annuls a large number of existing contracts between land owners and the Payette-Boise Water Users Association, and the proceedings under the contract totally disregard the contracts that had previously been entered into for the purchase of water rights for the lands against which assessments have been made under the contract before the Court.

It is not necessary that a law of a State in order to come within the constitutional provision must be either in the form of a statute enacted by the Legislature in the ordinary course of legislation, or in the form of a Constitution established by the people of the State as their fundamental law.

> "Any enactment, from whatever source originating, to which a State gives the force of law, is a law of the State within the meaning of the Constitution. Any order of a legislative character made by an instrumentality of the State exercising delegated authority is a law of the State within the meaning of the contract clause of the Constitution. This rule includes orders of state railway and other Commissions which look to the future and are therefor legislative in character, such as an order requiring the installation and use of an interlocking plant at the crossing of two railroads or an order fixing railroad rates."
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> 12 C. J. 990.

This Court, in New Orleans Water Works Co. vs. La. Sugar Refining Co., 125 U. S. 18, 31 L. Ed. 607, says:

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the Legislature to the corporation as a political subdivision of a State, having all the force of law within the limits of the municipality that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States.

"For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the Government, and, whether exercised by the Legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power." (Citing cases.)

In Grand Trunk Western Ry. Co. vs. Railroad Commission of Indiana, 221 U. S. 400, 55 L. Ed. 786, the Court held that an order of the Railroad Commission ignoring or annulling a contract between two railroad companies came within the constitutional provision referred to. The Court said:

"Observing first, that the order is a legislative act by an instrumentality of the state exercising delegated authority (Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210, 226), is of the same force as if made by the legislature, and so is a law of the state within the meaning of the contract clause of the Constitution." (Citing a number of authorities.)

And in Providence Savings & Loan Assur. Soc. vs. Ky., 239 U. S. 103, 60 L. Ed. 167, the Court, in considering a state law attempting to invalidate certain insurance policies because of the failure of the corporation to comply with the foreign corporation laws of the state, said:

"But the continuance of the contracts of insurance already written by the company was not dependent on the consent of the state. * * * These policies are contracts already made; the State cannot destroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the State's control."

The Contract Denies to the Land Owners the Liberty of Contract.

The contract deprives the land owners of the right to purchase water rights under private contracts or to participate in the negotiations as to either the price or the terms upon which the water may be purchased, or the restrictions that shall be impressed upon the fee simple title which they now hold to their respective farms. It imposes the restrictions of both the Reclamation Act and the Warren Act as to residence and use. A non-resident land owner or person who does not occupy his farm or live in the neighborhood cannot *lease his place or farm it by tenant.* His control of his property is so largely curtailed as to not only amount to a deprivation of property without compensation or due process or law, but it deprives the owner of the liberty of contract.

> "The right to make contracts is both a liberty and a property right, and is within the protection of the guarantees against the taking of liberty or property without due process of law. Neither the state nor the Federal Government, therefore, may impose any arbitrary or unreasonable restraint on the freedom of contract."
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> 12 C. J. 1200, and cases there cited.
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> "The 'liberty' that is guaranteed against invasion without due process of law embraces not only freedom from imprisonment, but also freedom in the enjoyment and use of one's faculties, in going where one pleases, in the choice and pursuit of a vocation or occupation, and in the making of contracts."

This Court, in Allgeyer vs. State of Louisiana, 165 U. S. 578, 41 L. Ed. 832, in discussing this question, says:

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his liveli-

hood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

The restrictions of the Federal Acts are not only imposed on the present owners but they are made to run with the land, and hence limit the market to purchasers who have the qualifications prescribed by the statute. It denies to persons the equal protection of the laws and is an unwarranted discrimination between its citizens. Clearly such burdens should not be imposed on a person's property without his consent, unless some great public emergency requires the imposition of such unusual and far-reaching restrictions.

Arbitrary Acts Amounting to an Abuse of the Taxing Power Are Prohibited by the Federal Constitution.

This Court has not hesitated to set aside assessments for local benefits or improvements when it has appeared that the tax was an abuse of the taxing power, and was but the arbitrary exercise of the power of government, even though the purpose or object for which it was levied was clearly a public use.

In Norwood vs. Baker, 172 U. S. 269, 43 L. Ed. 443, the city opened a street through the land of the defendant Baker and charged the entire cost of the condemnation proceedings, including the price it was required to pay for the land taken, to the owner under a pretended determination that the owner was benefited by the improvement to the amount of the entire cost thereof to the city. The action on its face was so arbitrary and unfair that the court had no difficulty in distinguishing the case from prior decisions of the court. It quotes with approval from a New Jersey case, as follows:

"I think it impossible to assert, with the least show of reason, that the legislative right to select

the subject of taxation is not a limited right. For it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed cannot be contracted to narrower bounds than the political district within which it is to operate, than that such power is entirely illimitable. If such prerogative has no trammel or circumscription, then it follows that the entire burden of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the lawmaking power to concentrate the burden of a tax upon specified property, does not exist. If a statute should direct a certain street in a city to be paved, and the expense of such paving to be assessed at the houses standing on the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such. If this cannot be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary. It has its limit; and the only inquiry is, where that limit is to be placed."

The Court also quotes with approval from Dillon's Treatise on Municipal Corporations, as follows:

"Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest; * * * But since the period when express provisions have been made in many of the state Constitutions requiring uniformity and equality of taxation, several courts of great responsibility, either by force of this requirement or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of

legislative discretion and power, and asserted what must upon principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

The principle upon which the above decision rests has been frequently reaffirmed by this court.

In the case of Martin vs. District of Columbia, 205 U. S. 135, 51 L. Ed. 743, it was claimed that the act under which the assessment had been made permitted an assessment in excess of the actual benefits conferred, and that the case shows a flagrant instance of that sort. Referring to this, the court said:

"If this be true, perhaps the objection to the act would not be disposed of by the decision in Louisville & N. R. Co. vs. Barber Asphalt Paving Co., 197 U. S. 430. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweight a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the Fourteenth Amendment, a system of delusive exactness and merely logical form.

"*But when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great*, it may not follow that the case last cited will be a precedent.. Constitutional rights like others are matters of degree." (Our italics.)

In the later case of Myles Salt Co. vs. Board of Comm'rs, 239 U. S. 478, 60 L. Ed. 392, the court again applied the principle followed in Norwood vs. Baker and Martin vs. District of Columbia, that where the proceedings were so devoid of any reasonable basis for the assessment of benefits as to be essentially arbitrary the proceedings were simply an abuse of the taxing power and deprived a person of his property without due process of law, within the meaning of the Fourteenth Amendment. In the case last cited the court said:

> "The charge is that plaintiff's property was included in the district not in the exercise of 'legal legislative discretion,' not that the scheme of drainage would inure to the benefit of the property, even indirectly, but with the predetermined 'purpose of deriving revenues to the end of granting a special benefit to the other lands subject to be improved by drainage, without any benefit' to plaintiff 'or its property whatever,' present or prospective.
>
> "Nothing could be more arbitrary if drainage alone be regarded. But there may be other purposes, defendants say, and, besides, that the benefit to the property need not be direct or immediate; it may be indirect, such as might accrue by reason of the general benefits derived by the surrounding territory. But such benefit is excluded by the averments, and it certainly cannot be said that the elevated land of Weeks island could be a receptacle for stagnant water, or would be otherwise a menace to health if not included within the district, or would defeat the purpose of the law, which seems to have been the ground of decision in George vs. Young, 45 La. Ann. 1232.
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> "The case, therefore, is within the limitation of the power of the state as laid down in Houck vs. Little River Drainage Dist. *supra*, which cites Norwood vs. Baker, 172 U. S. 269, and retains its principle. It has not the features which determined French vs. Barber Asphalt Paving Co., 181 U. S. 324, and the cases which have followed that case, and Phillip Wagner vs. Leser (239 U. S. 207), decided coincidently with Houck vs. Little River Drainage Dist. and cited in the latter.

"It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. Phillip Wagner vs. Leser, *supra*. We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others,—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind."

The question of arbitrary assessment of benefits again come before the court in Gast Realty & I. Co. vs. Schneider Granite Co., 240 U. S. 55, 60 L. Ed. 523. There the court said:

"The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse. Houck vs. Little River Drainage Dist., 239 U. S. 254, 262. The front-foot rule has been sanctioned for the cost of paving a street. In such case it is not likely that the cost will exceed the benefit, and the law does not attempt an imaginary exactness, or go beyond the reasonable probabilities. (Citing cases.) * * * But, as is implied by Houck vs. Little River Drainaage Dist., *if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact.* Martin vs. District of Columbia, 205 U. S. 135, 139." (Our italics.)

Clearly plaintiffs in error come squarely within the doctrine of these decisions. They are taxed wholly disproportionately to the other land owners in the District having old water rights. They have no relation whatever to such land owners. They are held in the District solely for the purpose of giving the District an opportunity to tax them for benefits which the District cannot confer. The right to purchase water rights from the Reclamation Service could be exercised by the individual land owners under private contracts. The contracts which some of them had entered into for that purpose were cancelled and annulled by the District under the contract now before the Court. Their defenses for reduction in the charge were taken from them, and most unusual and burdensome restrictions were placed upon the use of their property; and in addition thereto they were assessed the enormous charge of $75.00 per acre for something which they cannot use or enjoy unless they have certain qualifications.

The duty placed on the Board by the statutes of the State to determine the benefits,—after notice and after hearing the parties and viewing the land,—the District *contracted away* by stipulating in the contract with the Secretary that the assessment should be at $75.00 per acre without regard to what the benefits might be shown to be, and regardless of the fact that in some cases there will be no benefits because the land owners possess independent water rights. Besides, how can the District determine the value of a fee simple title which the land owners previously held as *compared with the encumbered title* that they will have when the contract becomes effective and the restrictions of the Reclamation Act are imposed upon the land and the owners?

The case cannot be disposed of on the theory upon which the Supreme Court of the State based its decision. The validity of this particular contract which the parties had agreed to execute and enter into, and which had been

authorized by the Directors of the District and approved, they say, by a majority of the voters at an election held for such purpose, was the only matter to be decided, the other matters were merely incidental. The ultimate question, of course, embraced the authority of the Secretary and District to enter into the contract, the constitutionality of the statutes under which they claimed to act and the validity of the proceedings of the District. But after all, the sole question was whether the contract was valid or invalid,—not whether some other contract would be valid. The Court had no right to assume that the District after it had entered into the contract would violate its provisions and assess the benefits in some other way or in accordance with the statute. The contract is not divisible. Its parts are interdependent. The Court cannot take out of the contract what it considers illegal and then say that the parties agreed to do what still remains.

The State Court, however, hardly touches upon the vital points in the contract,—the provisions which are unconstitutional and deprive plaintiffs in error of their property without due process of law, which violate the obligation of contract and deprive the parties of the liberty of contract and subject plaintiffs in error to the arbitrary powers of government are manifestly an abuse of the taxing power, and furnish a striking instance of the truth of the statement of Chief Justice Marshall in McCulloch vs. Md., 4 Wheat. 431, "That the power to tax is the power to destroy."

Wherefore, We respectfully submit that the judgment entered by the State Courts be reversed and set aside, and the contract declared void and unconstitutional.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. [redacted]47

JAMES O. PETRIE, OLIVER O. HAGA, E. F. FLOCHER, ET AL., PLAINTIFFS IN ERROR,

vs.

NAMPA & MERIDIAN IRRIGATION DISTRICT,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

J. B. ELDRIDGE,
JAMES H. RICHARDS,
OLIVER O. HAGA,
Attorneys for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

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JAMES G. PETRIE, OLIVER O. HAGA, R. F. BLUCHER, ET AL., PLAINTIFFS IN ERROR,

vs.

NAMPA & MERIDIAN IRRIGATION DISTRICT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

Statement.

Since our brief against the motion to dismiss was prepared, counsel for defendant in error have served their brief on the merits, in which they have again discussed at length the motion to dismiss. This and the apparent misconception on the part of counsel of the fundamental questions presented for decision in this case seem to justify a reply brief on our part.

We do not question the right of an irrigation district to construct a drainage system, nor the right of the Secretary of the Interior to construct drainage works where clearly necessary in connection with irrigation works constructed under the Reclamation Act, but he certainly has no general authority to construct such works and charge the cost thereof to the cost of water rights under that act. Congress has so far declined to extend the Reclamation Act to cover drainage works or the drainage of swampy lands.

ARGUMENT.

The Supreme Court of Idaho left but one question open for further consideration and that was a non-Federal question.

Counsel clearly misapprehends the scope and effect of the decision of the Idaho Supreme Court, and it may be that that court erroneously conceived that the only matter of special importance to plaintiffs in error was the amount that would be apportioned against their several tracts of land when the apportionment of benefit is made. The assessment of benefits, as stated in our brief on the motion to dismiss, is a wholly independent proceeding, having no relation whatever to this action, except that every question that was raised or could have been raised in the present proceeding is finally and conclusively determined so far as the Idaho courts are concerned, and cannot be reviewed or again considered in assessing the benefits. The judgment now before this court *is a judgment in rem*, binding not only the plaintiffs in error, but their lands in the district and their successors in interest, on every Federal question that can arise under the contract between the district and the United States Reclamation Service, and every such question was determined by the Idaho Supreme Court against plaintiffs in error in the case at bar. But one question was left open for further consideration and that was the amount

of benefits that should be apportioned against the several tracts of land referred to in the contract as "project lands." The Idaho court simply held that the contract was not controlling on the amount of benefits, but that in determining the charges that should be made against any particular tract, the district, and the court in reviewing the proceedings of the district, should be governed by the laws of the State and not by the contract. It is difficult to see how the court could hold the contract valid and affirm the judgment of the trial court, after concluding that the contract was not controlling as to the benefits, for manifestly this so completely changes the terms of the contract that it would be unfair, to say the least, to require the parties to carry out the contract as modified by the Supreme Court of the State.

But the question of benefits and the amount of benefits that will be apportioned to the several tracts of land is, generally speaking, a non-Federal question, and we repeat, therefore, that every Federal question that could arise under the contract must be determined in the case at bar. These questions include:

(*a*) Whether the taxes levied under this contract will be levied for a *public purpose* or *public use*.

(*b*) The right of the district to impose on the fee-simple title of plaintiffs in error the burdens and restrictions of the Reclamation Act as to acreage that may be owned and as to residence on their land.

(*c*) The right of the district to contract away its discretionary powers in the levying of taxes and to agree to levy such taxes, from time to time, as may be required by the United States Reclamation Service or by those who may succeed it in the management of the irrigation system.

(*d*) Whether the contract confers general benefits upon the public at large, or is merely an attempt on the part of the

district to act as the agent for certain individual land owners, imposing charges, burdens and restrictions upon their lands which they have not authorized and which cannot be imposed on their lands, under the provisions of the Federal Constitution without their consent.

(*e*) Whether the contract is a restriction on the right of alienation in this that the purchaser cannot obtain any water under the contract unless he has the qualifications prescribed by the Reclamation Act.

(*f*) Whether the contract deprives plaintiffs in error of the liberty of contract and of the right to use and enjoy their property in all legal and lawful ways, and as other land owners in the district obtaining water from the works owned and operated by the district.

(*g*) Whether the contract and the orders of the district violate the obligation of contract clause of the Federal Constitution in this, that they annul absolutely a large number of existing contracts between plaintiffs in error and the Payette-Boise Water Users Association, and attempt to substitute therefor, without their consent, the terms of the contract now before the court.

(*h*) Whether the contract in question is an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power.

(*i*) That the Secretary having no authority to contract for the building of a drainage system *for the district*, the contract cannot be binding on the latter, and it is therefore void and not valid as held by the Idaho court.

All of the foregoing questions were finally determined against plaintiff in error by the judgment now before this court for review. The only remaining question reserved

under the decision of the Supreme Court of Idaho is confined entirely to the extent of the charges that shall be made against the individual tracts of land or rather the amount, if any, that shall be allowed such land owners for their existing water rights, where any such may be claimed.

It seems idle, therefore, for counsel to contend that plaintiffs in error have no grievance until the benefits have been apportioned. Manifestly, under the statutes of Idaho, and the decisions of its highest court, the rights claimed by plaintiffs in error under the Federal Constitution must be determined in this suit. The judgment entered is *res adjudicata* in the independent proceedings that will be brought to apportion the benefits. In those proceedings benefits will be assessed at the enormous charge of seventy-five dollars per acre, except where some allowance may be made for the water right now owned by the land owner. Counsel for defendant in error assert in their brief that the contract did not fix the amount that should be apportioned to each tract of land, but that it was simply a lump-sum charge which the district could apportion over the lands in the district as it saw fit, and that the district in any event was required to apportion three million three hundred four thousand five hundred dollars against the "project lands" in the district. If the contract would justify such construction it would be far more objectionable than it is, for that would necessarily mean that if any of the forty-four thousand sixty acres of land which the contract designates as "project lands" should be found to have a partial or complete water right, the charge against the remaining lands would be proportionately increased. If, by way of illustration, 50 per cent of the lands should be found to have sufficient water, the remaining lands would then be assessed on the basis of one hundred fifty dollars per acre instead of seventy-five dollars, or double the actual cost of the water rights and double the amount that plaintiffs in error could purchase the water rights for if they contracted direct with the Reclamation Service. Counsel's argument is not

only unsound, but it is directly contrary to the expressed provisions of the contract, which says:

> (Par. 12, p. 20:) "The district will promptly apportion to the project lands in the district a total of three million three hundred four thousand five hundred dollars ($3,304,500), being a charge of seventy-five dollars ($75) per acre as the benefits under this contract to said lands. * * * *Provided*, That should the construction charge per acre as announced by the Secretary of the Interior, for the Boise project for a full water right, be in excess of seventy-five dollars ($75) per acre of irrigable land, the benefits to be assessed to the project lands in the district under this contract and collected by the district under this contract from the said project lands for the payment to the United States of the construction charge, shall, nevertheless, be only seventy-five dollars ($75) per acre. * * * *But the amount to be apportioned to the project lands in the district under this present contract shall not be in excess of seventy-five dollars ($75) per acre.*" (Italics ours.)

It will be noted also that the contract expressly provides that no charge for the purchase of water rights shall be made against any lands in the district that are not included in the term "project lands."

Paragraph 13 of the contract, page 21, provides:

> "It is fully understood that the old water-right lands of the district shall not in any event be liable for any part of the charges herein agreed to be apportioned to and collected from the project lands, nor the project lands for any portion of the charges herein agreed to be apportioned to or collected from the old water-right lands in the district, and the United States agrees to waive the right to hold either of the two classes of land for any part of the charges herein agreed to be apportioned to and paid by the other, but will look to the old water-right lands for the old water-right land charges and to the project lands for the project-lands charges."

In view of the above provisions counsel's contention seems wholly unwarranted.

It cannot be said that it may be that no charge will be made against lands of the plaintiffs in error when the benefits are apportioned, for, while the record contains only sufficient evidence to show the general nature of the rights held by plaintiffs in error, it does appear that an assessment will be made against one whose testimony appears in the records (page 60), and it is manifest that assessments will be made against all, and at the time of the trial of this case the district had actually made the assessment and it had followed literally the terms of the contract and assessed all the so-called "project lands" at the rate of seventy-five dollars ($75) per acre (Record, p. 67).

Counsel's contention that the contract had not been executed when this case was tried, and that the claims of the plaintiffs in error are therefore premature, is equally without merit, for it appears from the evidence and the judgment of the trial court and from the petition filed by defendant in error, that the district and the Secretary of the Interior *had actually agreed upon the terms of the contract* and that the written contract set forth in the record was the contract upon which they had agreed, and they had further agreed that it should not be formally signed until the validity of the contract had been approved by the court. There is no doubt as to the contract upon which the parties had agreed, for the district, as stated above, attached the contract as an exhibit to its petition and the court found as follows on that question:

> (Record, p. 52.) "That the Secretary of the Interior of the United States has approved the proposed contract with the Nampa and Meridian Irrigation District as to form and is ready to execute the same and proceed with the construction of the proposed work as soon as the legality and validity of the proposed contract with the Government has been affirmed by the court."

The contract was affirmed by the court and we are amazed at counsel's statement (page 21 from the brief of defendant in error) that the contract may not be signed, for on pages 85 and 86 of the same brief, counsel quote from the reports of the Secretary of the Interior, showing not only that the contract had been signed, but that Congress had appropriated money for constructing the drainage system to be constructed for the district thereunder, and that the work of construction was being carried on. It should be noted, however, that the plaintiffs in error filed a cross-complaint seeking to enjoin the district from executing the contract and *that* relief was denied them on the erroneous theory that the contract was valid in all respects except as to the one matter of fixing the amount of benefits that should be charged against the lands that had a partial water right. In denying the injunction sought by plaintiffs in error the court again decided against them every Federal question that can arise under the contract.

This is clearly a case where the execution of the contract should have been enjoined as held by this court in Vicksburg Water Company *vs.* Vicksburg (185 U. S., 65), for the mere execution of the contract creates a cloud and encumbrance upon the title of every owner of "project lands" in the district.

Counsel have said much in their brief on the merits or demerits of what are sometimes called "waste-water rights." Counsel's argument on this question, however, is wholly irrelevant and is not entitled to the slightest consideration, for under the laws of Idaho the appropriation of waste water is expressly althorized by statute and commended by the law, for it means the utilization of all the water. Section 3246, Idaho Revised Code, reads as follows:

> "All ditches now constructed or that may hereafter be constructed for the purpose of utilizing seepage, waste, or spring water of the State, shall be governed by the same laws relating to priority of right as those ditches, canals and conduits constructed for the purpose of utilizing the waters of running streams."

If the statute should be repealed or disregarded counsel's argument should be directed to the legislature and not to the courts, but vested rights to such water must be protected even though the statute should be changed. However, the question of the value of waste-water rights is not before the court in this case, and we refer to it simply because counsel have dwelt on the matter at some length in their brief. Counsel's statement that there are only two land owners in the district objecting to the contract in question, is equally unwarranted and irrelevant, the rights of a single land owner would seem to come within the protection of the Constitution. The "citation" on page 88 of the record shows the parties who are plaintiffs in error in this case—they represent substantially a third of the lands in the district.

Counsel have taken exception to some of the statements of fact in our brief on the ground that they do not appear on the record before the court. The record was condensed under paragraph 9 of rule 10 of this court, and many of the exhibits introduced in evidence are not stated in full. An abstract of most of them will be found on pages 91 to 93, inclusive, of the record, but all the exhibits are on file with the clerk of this court and we assume are available for examination, and the facts to which counsel take exception if not found in the printed record will be found in the exhibits referred to, and in the public documents containing the reports of the Reclamation Service, particularly volume 57 of House Documents, page 320, *et seq.*

In conclusion, we desire to call attention to the fact that the contract in question vests no title whatever in the district to any water. It purports to give to land owners having the requisite qualifications, an abstract right to demand and receive water, not from the district, but from the works of the United States Reclamation Service. Manifestly, the district which levies the tax and which entered into the contract and bound the lands of plaintiffs in error, cannot deliver the water to which they would be entitled for the taxes which they are compelled to pay. Outside agencies, over

which the district has no control whatever, will determine when and to what extent plaintiffs in error shall receive the water for which they are being so heavily taxed by the district, and the land owners themselves will be given no voice in the management or operation of the irrigation works upon which they will be dependent for water for the irrigation of their crops. Clearly, there is no precedent for such a contract. It is manifestly an abuse of the taxing power. If such facts had appeared in the case of Fallbrook Irrigation District *vs.* Bradley (164 U. S., 112), there is no doubt as to what the decision of this court would have been, for that decision rests upon a theory directly the opposite of that upon which the present contract is based. The contract now before the court will not permit a person to receive water for the improvement and development of his land unless he has certain qualifications, and if he has such qualifications he may only receive *not to exceed* what is actually required for the irrigation of a particular piece of land; he cannot use it on any other land; he cannot rent it to others when he is not using it; clearly, there can be no *public use* or *public purpose* to be subserved by such contract, and if it does not fall under the inhibitions of the Federal Constitution there would seem to be no limit to what may be done by public corporations vested with the taxing power.

Respectfully submitted,

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INDEX

OF

BRIEF OF DEFENDANTS IN ERROR

Petrie et al. vs. Nampa & Meridian Irrigation District.

PAGE

Motion to Dismiss—Argument and citations.....1 to 33

A controlling non-federal question.....1 to 14

Issue of benefits or no benefits prematurely raised.1 to 14

Statutes quoted 2

Quotations from opinion of State Court.....6, 7, 9

New York C. & H. Ry. Co. v. New York,
186 U. S. 269, 46 L. Ed. 1158.....10, 11

Rutland R. Co. v. Central Ver. R. Co.,
159 U. S. 630, 40 L. Ed. 284.....11, 12

Murdock v. Memphis, 87 U. S. 20..... 12

Jenkins v. Loewenthal, 110 U. S. 222..... 12

Baupre v. Noyes, 138 U. S. 397..... 12

Wood Mowing & R. Mch. v. Skinner, 139 U. S. 293.. 12

Hammond v. Johnson, 142 U. S. 73..... 12

Tyler v. Cass. Co., 142 U. S. 288..... 12

Delaware Co. v. Reybold, 142 U. S. 636..... 12

Eustis v. Bolles, 150 U. S. 361..... 12

The decision of the State Court not a final decision, but a proceeding to secure evidence and to guide the district in further proceedings, a moot question of the mere naked right to make a contract, no obligation on the Plaintiffs in Error or the District.....14-33

PAGE

Tregea v. Modesto Irr. Dist., 164 U. S. 179, 41 L. Ed. 395 ----------14, 15, 16

Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369 ----------18, 20, 24, 53, 55

Comparison of Irr. District Laws of California with those of Idaho----------17 to 29

No contract signed----------21-33

No tax, assessment or apportionment determined by State Court against any of appellants----------22-24

Appellants' statement outside of and contrary to the findings of fact by the Court----------22-23-24

State statutes quoted----------25-29

Argument on the Merits----------34-87

The appellants' statements of fact, outside of and contrary to the findings of the Court----------34-41

Testimony referred to by appellants is a part of the irrelevant testimony improperly and prematurely introduced concerning issues not before the Court in this case----------34-41

The findings of fact quoted----------41-47

No rights claimed by appellants under federal statutes ----------51-52

The decision of the State Court sustains the validity of the Federal statutes ----------51-52

Fallbrook Irr. District v. Bradley, 304 U. S. 112, 41 L. Ed. 369 ----------53-55

Hard v. Boise City Irr. Co., 9 Idaho 589, 76 Pac. 331 56

The Federal statutes authorize the Secretary of the Interior to make the proposed contract----------57-87

Federal statutes quoted ---------- 59

PAGE

Swigert v. Baker, 229 U. S. 187, 57 L. Ed. 1143 ---------- 57, 58, 80, 81

Pioneer Irr. Dist. v. Stone, 130 Pac. 382 ---------- 60

Irrigation districts the best means for carrying out the provisions of the Reclamation Laws ---------- 60, 61, 62

Stock Subscription Contracts ---------- 63, 64

Acreage held by any one person in excess of 160 acres ---------- 64-73

DeWolf v. Moore, 37 L. D. 110 ---------- 65

Oregon Short Line v. Pioneer Irr. Dist., 102 Pac. 904 ---------- 68, 66

Union Traction Co. v. City of Chicago, 204 Ill. 363, 68 N. E. 519 ---------- 67

Page & Jones Taxation by Assessment, par. 653 ---------- 67

Colburn v. Wilson, 24 Idaho 103, 132 Pac. 579 ---------- 68

Quotation from opinion of State Court in this case 69-73

Authority of Secretary of Interior to construct drainage works ---------- 73-87

C. G. Burt et al. v. Farmers Coop. Co., 30 Idaho 752 ---------- 73, 74, 75

Bissett v. Pioneer, 21 Idaho 98, 120 Pac. 461 ---------- 74, 76

Pioneer Irr. Dist. v. Stone, 23 Idaho 344, 130 Pac. 382 ---------- 74, 76, 77

Kinney on Irrigation, par. 38 ---------- 79

Annual reports of Secretary of the Interior to Congress, drainage ---------- 80-84

Book of estimates and appropriation bills concerning drainage ---------- 85, 86

Supreme Court

OF THE

United States

OCTOBER TERM, 1917.

No. 291.

JAMES G. PETRIE,
OLIVER O. HAGA,
R. F. BLUCHER, et al., *Plaintiffs in Error.*

vs.

NAMPA & MERIDIAN IRRIGATION DISTRICT, *Defendants in Error.*

Brief of Defendants in Error

In Error to the Supreme Court of the State of Idaho.

There is pending in this case a Motion to Dismiss on the following grounds:

1st. Because the judgment of the Supreme Court of Idaho to which said Writ of Error was directed is not a final judgment.

2nd. That there is no Federal question involved.

3rd. That the highest court of the state in rendering judgment decided against the Plaintiffs in Error upon an independent ground not involved in a Federal question, and broad enough to support the judgment.

4th. That the proceeding before the Supreme Court of Idaho in this case is a proceeding to obtain a judicial opinion, upon which the parties might base further action and after all nothing but a proceeding to secure evidence, and that in the securing of such evidence no right protected by the Constitution or Statutes of the United States is invaded.

As the question presented by the Motion to Dismiss has not been determined at the time of the preparation of this Brief and may not be heard until the final argument, this Brief covers the question of jurisdiction raised by the Motion as well as the argument on the merits.

The case at bar is a special statutory proceeding under Section 2401 Idaho Revised Codes. The language of the Statute is as follows:

> "The Board of Directors of the irrigation district shall file in the District Court of the County in which their office is situated a petition praying in effect that the proceedings aforesaid may be examined, approved and confirmed by the court."

This section further provides:

> "That after the organization of the district is complete, a petition may be filed for the confirmation of the proceedings so far, or after the authorization of any issue of bonds such petition may be filed."

In Section 2397, Idaho Revised Codes, it is provided:

"After such authorization of indebtedness shall have been made by the voters evidenced by such bond election, the board of directors may, instead of issuing bonds in the manner provided in this title, enter into an obligation or contract with the United States for the construction of the necessary works under the provisions of an act of Congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June 17, 1902, and the rules and regulations thereunder; or the board of directors may issue bonds for a portion of the amount of indebtedness authorized by such bond election and enter into an obligation or contract with the United States to the extent of the remainder of such amount."

And Section 2398, Idaho Revised Codes, provides:

"Whenever any amount of money shall have been advanced by the United States for the construction of irrigation works, contemplated under the provisions of this title, by the authority of said act of Congress, the taxing powers of the district, as provided in this title, shall be used to repay into the treasury of the United States the amount of money so advanced in the manner contemplated in this title, and as may be provided in such contract between the directors of said district and the United States; and such levies and assessments shall be made each year under the authority of the district as will return to the treasury of the United States the amount or proportion of such money advanced as may have been agreed to in such contract. The works constructed under the provisions of such contract with the United States shall be controlled and administered by the district in accordance with the provisions of said act of Congress and the regulations thereunder."

The Nampa & Meridian Irrigation District was organized and the organization confirmed by Decree of the Court a number of years prior to the proceedings involved in this suit. (Par. 2 Amended Petition, pages 3 and 4 transcript, admitted par. 2 of Answer, page 31, transcript.)

This case was brought under the provisions of Section 2401 quoted above to secure a judicial opinion as to the regularity and validity of the election and other proceedings authorizing the Directors of the District to enter into a contract with the United States, the procedure in authorizing such contract being the same as in the case of a bond issue.

At the time the petition was filed in this case no apportionment of benefits had been made and no assessment of any kind levied under the proposed contract and no apportionment of benefits or assessment of any kind is included in the proceedings described in the petition and before the State Court in this case.

The case was brought for the purpose of securing a judicial opinion as to the regularity and validity of the proceedings authorizing the execution of a proposed contract which was as yet unsigned.

The question of the apportionment of benefits and the question of what, if any, tax shall be levied against any tract of land in the District is a question to be determined at a later date and which will come before the court in another case when the Directors of the District file their petition under the State Law for confirmation of their apportionment of benefits, but is a question which is not before the court in this case.

The answer admits the material allegations of the petition (see par. 1 and 2, 3, 6, 7 and 8 of the Answer, pages 31, 32 and 36 of the transcript admitting par. 1 and 2 and 6 to 15 of the amended petition).

In these admitted paragraphs, petitioners alleged due performance of each and every act which they were required to perform under the provisions of Sec. 2396, R. C. Idaho. Hence, in this case defendants have admitted:

1. That the district by a resolution entered on its records formulated a general plan of its proposed operation.

2. That for the purpose of ascertaining the cost, surveys were made under the direction of competent engineers.

3. These were submitted to the State Engineer and were approved by him.

4. The board determined the amount necessary and called an election and submitted the question to the voters of the district.

5. The election was held in the manner provided by law, 1206 votes were cast for and 160 against the contract, and more than two-thirds of the electors voting for the contract, it was declared carried and these proceedings have been brought for the purpose of securing a judicial review of the proceedings to this point.

In this case the contract with the Government constitutes the "plan" required by the statute and when it is conceded that the proceedings of the board of directors have been regular

and the requirements of the law fully carried out, we contend that there is nothing further to be determined in the case.

The Defendants in the trial court improperly attempted to inject into this case a lengthy discussion of the benefits which they apprehended might be apportioned against certain tracts of land in the District, and in order to raise that question alleged in their answer affirmative matters involving it, which were wholly immaterial and also filed a cross complaint, and in support of such irrelevant matter introduced oral testimony.

But the Supreme Court of the State decided:

> "This case was tried in the district court upon the theory that this was a special proceeding brought for the express purpose of having the proceedings authorizing the Nampa & Meridian Irrigation District to enter into the contract under consideration examined, approved and confirmed by the district court. Counsel for appellants have taken the position, and we think erroneously, that this action was brought not only for that purpose but also for the purpose of the apportionment of benefits under Sec. 2399, Rev. Codes; and in order to raise this question they alleged in their answer affirmative matters involving it which were wholly immaterial and which should have been stricken from the answer. The cross-complaint and the answer to the cross-complaint were likewise immaterial and were subject to the same motion. The district court did not find upon any of these matters, for the reason that they were immaterial in this proceeding. We think that this conclusion reached by the trial court was correct."
>
> (Page 80 of Transcript reported 153 Pac. 425.)

and determined the limits of the issues involved in this case in the following language:

"This is a special statutory proceeding authorized by Sec. 2401, Rev. Codes, which provides, among other things: 'The board of directors of the irrigation district shall file in the District Court of the county in which their office is situated a petition, praying in effect that the proceedings aforesaid may be examined, approved and confirmed by the court, * * *. That after the organization of the district is complete, a petition may be filed for the confirmation of the proceedings so far, or after the authorization of any issue of bonds such petition may be so filed, * * * * ;' and is brought for a confirmation to the extent only of determining the legality of the proceedings authorizing the district to enter into the contract with the United States, and not for the purpose of the assessment of benefits to the lands within the irrigation district."

(Page 75 of Transcript.)

This irrelevant and improper affirmative matter in the answer and cross-complaint and the oral testimony in support thereof concerning the assessments which appellants fear may be levied under an apportionment of benefits which they apprehend may be made under a contract which they surmise may be signed, none of which had been done at the time the petition in this case was filed, an issue concerning an apprehended apportionment of benefits which is no part of the proceeding involved in this case but a matter to be taken up at a later date in another case, is the basis of appellants' entire argument both in this court and in the State Court, and assuming that the evidence when produced in the case to be hereafter brought to determine the apportionment of benefits, will show that certain tracts of land in the district referred to as the Blucher and Haga tracts already have a water right (which the district

denies) and assuming further that such water rights, if any, are adequate and sufficient water rights (although appellant Haga has admitted that his alleged right, a waste water right, is inadequate and insufficient, see pages 60 and 61 of transcript) and assuming further that the said tracts of land will receive no benefits under the proposed contract, and assuming further that if the evidence when properly presented in the apportionment case to be hereafter brought should show the facts to be as appellants claim them to be, the District Court would refuse to carry out the law and refuse to cancel the assessment and assuming further that the Supreme Court of the State of Idaho would sustain the District Court in such refusal, the Plaintiffs in Error who were the Defendants in the trial court have asked this court to set aside the judgment of the Supreme Court of the State on the ground that that judgment deprives them of their property without due process of law.

The laws of the State of Idaho, as construed by the Supreme Court of that state, require that the issue as to the apportionment of benefits should be presented at the proper time and place and in the proper cause of action, namely, the action to be filed at a later date for confirmation of the apportionment of benefits and will not permit the appellants to present the issue prematurely by injecting it in an irregular and improper manner into a case brought for the purpose of confirming the regularity and validity of the election and other proceedings, authorizing the Directors of an irrigation district to sign a proposed contract with the United States.

This does not mean that the appellants will not have their day in court on the question of the proper apportionment of benefits under the contract.

To the contrary, it is made exceedingly plain that they will have every opportunity to be heard on that question in the proper form of action and at the proper time. The State Court says:

> "Accordingly, if there are any lands within the Nampa & Meridian Irrigation District which are subject to irrigation from the waters received under the contract from the Boise Project, which have a water right in whole or in part, or that will not be benefited by reason of the contract entered into between the United States and the irrigation district, said lands will not be subject to assessment in excess of benefits."
>
> "Sec. 2400, Rev. Codes, provides that notice shall be given to each of the landowners of the time and place the board of directors will make the assessment of benefits, when a hearing will be given to each owner of land within the district and his lands will be classified and assessed according to benefits received. Should any landowner make objection to said assessment or any part thereof before said board and said objection is overruled by the board and said landowner does not consent to the assessment as finally determined, such objection shall, without further proceedings, be regarded as appealed to the district court and to be heard at the said proceedings to confirm as aforesaid. Like objections may be urged by landowners who may be affected by the drainage system or stored supplemental water rights."
>
> "Sec. 2403, Rev. Codes, among other things, provides:
>
> "'The Court shall disregard every error, irregularity or omission which does not affect the substantial right of any party, and if the court shall find that said assessment list and apportionment are in any substantial matter er-

roneous or unjust, the same shall not be returned to said board, but the court shall proceed to correct the same so as to conform to this title and the rights of all parties in the premises, and the final order or decree of the Court may approve and confirm such proceedings in part, and disapprove other parts of said proceedings; and * * * * the court shall correct all the errors in the assessment, apportionment and distribution of costs as above provided, and render a final decree approving and confirming all of the said proceedings * * *.'"

"A judgment of the district court in affirming the proceedings of the irrigation district in entering into a contract with the United States to supply water to irrigate lands within the district and to provide for the joint construction of a drainage system, is not *res judicata*, so far as the assessment of benefits to the lands within the district is concerned, and does not preclude statutory proceedings for such assessment."

(Pages 76 and 77 of Transcript.)

The State Court decided against the Plaintiffs in Error on the ground that the issue in regard to the proper apportionment of benefits is not properly before the court in this case.

This is very similar to the question considered by this court in the case of New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. Ed. 1158.

In stating the facts in that case the Court said:

"Petitioners rely in this case upon the fact that the property assessed consists solely of a roadway through Park avenue or Vanderbilt Ave. East, depressed from 10 to 18 feet below the grade of the street, the sides of which depression are held in place and faced by a retaining wall, surmounted by an iron fence, whereby all access to and from the roadway to the street is rendered impossible.

except at the intersection of side streets, where bridges are built for the accommodation of traffic. Their claim is that no possible benefit had, would, or could inure to the benefit of the railway companies by the construction of the proposed improvements; and all the oral testimony tended to show that fact."

And the court expressed its conclusion in the following language:

"Not only was there no federal question raised in the record, but the appellate division made no allusion to such a question, and dismissed the petition on the *ground that the charter of New York did not permit a question of benefit or no benefit to be raised in such a proceeding—a ground wholly independent of a Federal question.*"

(New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. Ed. 1158.)

We do not believe that there is any federal question at all involved in this case, but if there is such federal question, it is certain that there is also a non-federal question, broad enough to support the judgment of the State Court.

It has frequently been decided by this court that:

"The decision of a Federal question by a State Court will not prevent dismissal of a writ of error from the Supreme Court, if the State Court also decided against the Plaintiff in Error upon an independent ground not involving a Federal question and broad enough to support the judgment."

(Rutland R. Co. v. Central Vermont R. Co., 159 U. S. 630, 40 L. Ed. 284.)

In that case the Court said:

> "It is well settled by a long series of discussions of this court that where the highest court of the state, in rendering judgment decides a Federal question, and also decides against the Plaintiff in Error upon an independent ground not involved in a federal question and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question."
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> Murdock v. Memphis, 87 U. S. 20;
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> Jenkins v. Loewenthal, 110 U. S. 222;
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> Beaupre v. Noyes, 138 U. S. 397;
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> Wood Mowing & R. Mach. Co. v. Skinner, 139 U. S. 293;
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> Hammond v. Johnson, 142 U. S. 73;
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> Tyler v. Cass County, 142 U. S. 288;
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> Delaware Co. v. Reybold, 142 U. S. 636;
>
> Eustis v. Bolles, 150 U. S. 361.
>
> in the last two of which many other cases to the same effect are cited."
>
> (Rutland R. Co. v. Central Vermont, 159 U. S. 630, 40 L. Ed. 284.)

The controlling nature of the non-federal question determined against the appellants in this case by the State Court is forcibly illustrated by the special concurring opinion of Justice Morgan (pages 80 and 81 of the transcript). Justice Morgan concurs in the decision of the majority, but emphatically disagrees with the majority in regard to one of the matters discussed, entirely ignores the opinion of the majority on all

other questions except one, and concurs in the decision solely on the following ground:

> "This question appears to have been prematurely raised in this proceeding, and was not properly before the district court, nor is it properly before this court for decision. My concurrence in the conclusion reached by the majority of the court with respect to this point is, therefore, based upon the view expressed in the following portion of the opinion: 'We are, however, aware of no valid reason why we should anticipate the final action of the district court in assessing the benefits to landowners within the irrigation district who own land in excess of 160 acres."
>
> (Page 81 of Transcript.)

If this purely non-federal question were not a controlling question, then Judge Morgan's opinion would have been a dissenting opinion instead of a concurring opinion, and this special concurring opinion illustrates the fact that whatever might be the difference of opinion on any or all other questions so long as the Supreme Court of the State holds against the appellants on the ground that the question of benefits or no benefits is not properly before the court in this case, and that there is no reason why the Supreme Court should anticipate the action of the District Court in the apportionment of benefits, and so long as the laws of the State of Idaho as construed by the Supreme Court of that state prohibit the appellants from raising this question prematurely in this proceeding, and require him to present that issue at the appropriate time and place and in the proper form of action (a purely non-federal question which has been determined against the appellants by

the State Court) no difference of opinion on any other question could affect the decision as is shown by the opinion of Justice Morgan, who disagrees with his associates in regard to other matters discussed in the opinion, but concurs in the decision solely on the ground that the issue in regard to benefits or no benefits has been prematurely raised.

Moreover, in an irrigation district case involving the very same procedure now under consideration, this court has decided that the question involved in a procedure of this kind is merely a moot question so far as the Supreme Court of the United States is concerned and presents no appealable issue of any kind whatever. (Tregea v. Modesto Irr. Dist., 164 U. S. 179, 41 L. Ed. 395.)

In this case the Court said:

> "But going beyond this matter, we are confronted with the question whether, in advance of the issue of bonds and before any obligation has been assumed by the district, there is a case or controversy with opposing parties, such as can be submitted to and can compel judicial consideration and judgment. This is no mere technical question. For, notwithstanding the adjudication by the courts of the state in favor of the validity of the order made for the issue of $400,000 of bonds, and, notwithstanding any inquiry and determination which this court might make in respect to the matters involved, there would still be no contract executed, no obligation resting on the district. All that would be accomplished by our affirmance of the decision of the state court would be an adjudication of the right to make a contract, and unless the board should see fit to proceed in the exercise of the power thus held to exist, all the time and labor of the court would be spent in determining a mere barren right—a purely moot question."

"We are not concerned with any question as to what a state may require of its judges and courts, nor with what measures it may adopt for securing evidence of the regularity of the proceedings of its municipal corporations. It may authorize an auditor or other officer of state to examine the proceedings and make his certificate of regularity conclusive evidence thereof, or it may permit the district to appeal to a court for a like determination, but in either event it is a mere proceeding to secure evidence."

"The directors of an irrigation district occupy no position antagonistic to the district. They are the agents and the district is the principal. The interests are identical, and it is practically an *ex parte* application on behalf of the district for the determination of a question which may never in fact arise. It may be true, as the supreme court says, that it is of advantage to the district to have some prior determination of the validity of the proceedings in order to secure the sale of its bonds on more advantageous terms, but that does not change the real character of this proceeding."

"This is not the mere reverse of an injunction suit brought by an inhabitant of the district to restrain a board from issuing bonds, for in such case there is an adversary proceeding. Underlying it is the claim that the agent is proposing to do for his principal that which he has no right to do, and to bind him by a contract which he has no right to make; and to protect his property from burden or cloud the taxpayer is permitted to invoke judicial determination. If in such suit an injunction be granted, as is prayed for, the decision is not one of a moot question, but is an adjudication which protects the property of the taxpayer."

"The power which the directors claim is a mere naked power, and not a power coupled with an interest. It is nothing to them, as agents, whether they issue the bonds or not; they neither make nor lose by an exercise of the alleged power; and if it be determined that the power

exists, still no burden is cast upon the property of the district because no bonds are issued save by the voluntary act of the board."

"Some light may be thrown on this question by reference to a matter of a somewhat kindred nature. In states which provide for the organization of corporations under general statute different modes of procedure are prescribed. In some states it is sufficient for the parties desiring to incorporate to prepare a charter, acknowledge it before some official, and file it with the secretary of state, or other public officer, and the certificate of such officer is made the evidence of the incorporation. In other states the parties may file a petition in some court, and that court upon presentation thereof examines into the propriety of the incorporation, and if satisfied thereof enters a decree declaring the petitioners duly incorporated, and the copy of such decree is the evidence of the incorporation. Does the difference in procedure between these two cases create any essential difference in character? Is the one executive and the other judicial? Suppose, in the latter case, the statute had provided that either one of the petitioners might appeal from the decree of a lower to the supreme court of the state, in order to obtain a final adjudication in favor of the propriety of such incorporation, would this court entertain a suit in error to reverse such adjudication by the highest court of the state? Would it not be held in effect, whatever the form, a mere *ex parte* case to obtain a judicial opinion, upon which the parties might base further action? It seems to us that this proceeding is after all nothing but one to secure evidence, that in the securing of such evidence no right protected by the Constitution of the United States is invaded, that the state may determine for itself in what way it will secure evidence of the regularity of the proceedings of any of its municipal corporations, and that unless in the course of such proceedings some constitutional right is denied to the individual, this court cannot interfere on the ground that

the evidence may thereafter be used in some further action in which there are adversary claims. So on this ground, and not because no Federal question was insisted upon in the state court, the case will be dismissed."

(Tregea v. Modesto Irr. Dist., 164 U. S. 179, 41 L. Ed. 395.)

The Irrigation District laws of California differ from the Irrigation District laws of Idaho in this particular: that under the California law the assessments are levied on an *advalorem* basis (or at least such was the case at the time of the decision of this court in the case of Tregea v. Modesto Irr. Dist., *supra*, 164 U. S. 179, 41 L. Ed. 395, and the case of Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. Ed. 369), and no provision is made in the California law for any apportionment of benefits in the sense that that term is used in Idaho, but in California the tax to pay for irrigation improvements is apportioned to the several lots and tracts of land in the district on the basis of the assessed valuation of the several tracts otherwise referred to as the "*advalorem basis*" which procedure under the California law has been quite fully discussed by this court in the case of Falibrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. Ed. 369.

Section 17 of the Wright Act of California provides:

"Said bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district."

And in Section 18 it is provided:

"The Assessor must between the first Monday in March and the first Monday in June in each year, assess all the

real property in the district to the persons who own, claim or have possession or control thereof, at its full cash value."

Under the California system this assessment at the full cash value was the basis of the division of the tax burden among the several landowners to pay the cost of the irrigation works. This system is commonly referred to as the "*advalorem system*" in contrast to the Idaho system which is sometimes referred to as the system of assessment according to benefits. It is obvious that the California Statute makes no pretense of distributing the charge for the irrigation system in proportion to the benefits received and under that system, a farm which was already productive and valuable would pay a large share of the cost of the irrigation system, although it might be but little benefited by irrigation, and likewise a town lot which is valuable for residence or business purposes might pay a large share of the cost of irrigation and receive but little benefit, while a tract of arid farm land of low value might be benefited to a far greater extent and yet pay a much lower tax. These were among the objections which were urged upon the attention of the courts during the early days of the irrigation district laws, and harsh and unequal as the California law appears in comparison with the Idaho Law under which the charges are assessed in proportion to the benefits received, yet this California law, with all its harshness and inequality, was fully sustained as not in conflict with any provision of the Federal Constitution.

(Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369.)

And under the California law the only hearing allowed the landowner on the question of benefits is at the time of the organization of the district and that goes only to the question whether the land will be benefited at all or not, and not to the question of the amount of the benefit.

It is provided in Section 2 of the California Law, known as the Wright Act:

> "Nor shall any lands which will not in the judgment of the said board be benefited by irrigation by said system be included within said district."

This is the only opportunity which the California law gives the landowner to be heard on the question of whether his land will or will not be benefited by the proposed irrigation system and if it will be benefited in the slightest degree it may be included and assessed, not in proportion to benefits received, but in the proportion that its full cash value is to the cash value of the other lands of the district, but this provision for a hearing, meagre and perfunctory as it may be, is sufficient to satisfy the requirements of the Federal Constitution in regard to due process of law, and when the district has been organized the question of benefits is finally and conclusively determined and the landowner has had the only opportunity which he will ever have for a hearing on that question, and if his land is included in the district, it is finally settled that the land is bound for its share of any bonds which may be issued and in proportion to the value of the land. So under the California Law when the case of Tregea v. Modesto Irrigation District (supra) came before the court, the district having been already organized,

there was no further opportunity for any hearing on the question of benefits, the landowner had had the only opportunity which he would ever have to be heard on the question of benefits and that question had been determined against him by the inclusion of his land in the district.

> "We think this alleged difference is not material. It is in each case one of degree only, and the fact of the benefit is by the act to be determined after a hearing by the board of supervisors. In this case the board has necessarily decided that question in favor of the fact of benefits by retaining the lands in the district."
>
> (Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 168, 41 L. Ed. 392.)

And the legal status of the lands under consideration in the case of Tregea v. Modesto Irrigation District with reference to their liability for assessment to pay the proposed bond issue was the same that the status of the Idaho lands now under consideration will be after the district court shall have held its hearing on the question of benefits after due notice in the manner provided by statute, and shall have finally apportioned benefits against the land in issue, and such apportionment by the district court shall have been confirmed by the Supreme Court of the State.

Not until all these additional steps shall have been taken, will the Idaho case now under consideration have reached that stage of finality which was presented in the case of Tregea v. Modesto Irr. Dist. at the time that case was decided by this court, and even if all the additional steps mentioned had been taken prior to the decision of the Supreme Court of Idaho in this

case and the apportionment of benefits finally and conclusively determined, still this appeal would have to be dismissed because the proposed contract under consideration had not yet been signed by the District nor by the Secretary of the Interior, and might never be signed, and presents a purely moot question, a proceeding provided by the Idaho Legislature, for the purpose of securing evidence and furnishing the district with a judicial opinion for its guidance in further procedure.

As this court said in the Tregea v. Modesto case:

> "But going beyond this matter, we are confronted with the question whether in advance of the issue of bonds and before any obligation has been assumed by the district, there is a case or controversy with opposing parties such as can be submitted to and can compel judicial consideration and judgment. This is no mere technical question. For notwithstanding the adjudication by the courts of the state in favor of the validity of the order made for the issue of $400,000 of bonds, and notwithstanding any inquiry and determination which this court might make in respect to the matters involved, there would still be no contract executed, no obligation resting on the district. All that would be accomplished by our affirmance of the decision of the state court would be an adjudication of the right to make a contract, and unless the board should see fit to proceed in the exercise of the power thus held to exist, all the labor and time of the court would be spent in determining a mere barren right—a purely moot question."
>
> (Tregea v. Modesto Irr. District, *supra.*)

In the paragraph quoted above the court refers to the possibility that the proposed contract may never be executed. The proposed contract submitted in this case is shown by the record

to be unsigned (see form of contract, page 22 of record, also paragraph 6 of petition admitted by paragraph 6 of Answer, page 36 of record, also finding of fact No. 18, page 52 of record, also finding No. 5, page 48) and of course the paragraph quoted above applies with equal force in this case, but in this case there is also another reason why the issue which counsel are trying to argue in this case may never arise. At the time the petition was filed in this case no apportionment of benefits had been made and, of course, no apportionment of benefits was included in the proceedings covered by this case, nor has any apportionment of benefits yet been determined by the district court. So it is entirely possible, even if the contract is signed, that no benefits will ever be taxed against any of the lands of the plaintiffs in error, and in that event they would not be affected at all and would have no ground on which to appeal to the court. So the question naturally comes to mind: Why should the time of the court be taken up in the discussion of issues which may never arise? Especially when the essential facts on which counsel base their argument, namely, that appellants' lands will not be benefited, that some of them already have water rights, or partial water rights, that O. O. Haga holds more than one hundred sixty (160) acres of land, and all the rest of the rigmarole of assumed facts which counsel advance in their Brief because it is necessary to assume such facts in order to make any argument at all, are alleged solely on authority of counsel, without any reference to the finding of facts, and are nowhere to be found in the finding of fact by the court and an inspection of the findings reveals

the fact that the findings by the court do not offer the slightest support, directly or indirectly, for counsel's assumption of the existence of these essential facts. (See findings of fact, pages 45 to 52 inclusive of the record.) And if he assume that these issues of fact have been properly before the court at all, we must conclude that the trial court has determined against the appellants as to the existence of the facts which they claim.

Counsel for Plaintiffs in Error claim that the lands of Mr. Haga and Mr. Blucher are a part of the 44,060 acres of district land referred to in the proposed contract as "project" lands, for which it is proposed to furnish full water rights, and then assert in their Brief that these two tracts of land are already irrigated and already have water rights, or partial water rights, from another source, and therefore would not be benefited by the proposed purchase of water rights from the Boise Project, and then assumes further that benefits will be apportioned to this land by the district, and on these assumed facts proceeds to argue that the land is being taken without due process of law.

But the only thing in the findings of fact in regard to the character of the land in question is the following:

> "That there are within the boundaries of the said Nampa and Meridian Irrigation District 44,060 acres of land which the said District is unable to supply with water for irrigation from the canals and water rights now owned by the district, being the lands herein referred to as the "project" lands of the district. The said lands are arid in character and require water for irrigation in order to produce crops. That the said Boise Project has been constructed for the purpose of supplying said lands

with water. That by the terms of the proposed contract, the United States offers to sell to the district water rights for said lands, upon terms named in said contract and which are satisfactory to the district."

(Par. 5, page 48 of Transcript.)

It does not appear that counsel have questioned the correctness of the findings of fact made by the court. There is no assignment of error to the effect that the evidence does not support the findings, and even if that issue had been raised, it is not a question which would be reviewed in this court.

> "In this case the board has necessarily decided that question in favor of the fact of benefits by retaining the land in the district. Unless this court is prepared to review all questions of fact of this nature decided by a state tribunal, where the claim is made that the judgment was without any evidence to support it or was against the evidence, then we must be concluded by the judgment on such a question of fact and treat the legal question as based upon the facts as found by the state board."
>
> (Fallbrook Irr. Dist. v. Bradley, 164 U. S. 168, 41 L. Ed. 392.)

The Idaho landowner, like the California landowner, has an opportunity to be heard before the board of county commissioners at the time the district is organized and the boundaries thereof determined, but the Idaho landowner is doubly and thribbly protected against any possibility that his property will be taken without due process of law. For under the Idaho law, after the district is organized, the landowner still has two more hearings before any part of the charge for the irrigation works can be fixed upon his land, one hearing before the Board

of Directors of the District, and another before the District Court. At the time of the filing of the petition in this case, neither of these two proceedings had yet been held. So, of course, the apportionment of benefits is not included in this case, and it is not yet determined whether any of appellants' land will ever be required to pay any part of the cost of the proposed improvements, even if the proposed contract should be signed.

The Idaho Statute in regard to the apportionment of benefits, the hearing before the Board on this question, and the confirmation proceedings before the court, is as follows:

"Apportionment of Benefits.

"Sec. 2399. Whenever the electors shall have authorized an issue of bonds as hereinbefore provided, the board of directors shall examine each tract or legal subdivision of land in said district, and shall determine the benefits which shall accrue to each of such tracts or subdivisions from the construction or purchase of such irrigation works; and the cost of such works shall be apportioned or distributed over such tracts or subdivisions of land in proportion to such benefits; and the amount so apportioned or distributed to each of said tracts or subdivisions shall be and remain the basis for fixing the annual assessments levied against such tracts or subdivisions in carrying out the purposes of this title. Such board of directors shall make, or cause to be made, a list of such apportionment or distribution, which list shall contain a complete description of each subdivision or tract of land of such district with the amount and rate per acre of such apportionment or distribution of cost, and the name of the owner thereof; or they may prepare a map on a convenient scale showing each of said subdivisions or tracts with the rate per acre of such apportionment entered

thereon: *Provided*, That where all lands on any map or section of a map are assessed at the same rate a general statement to that effect shall be sufficient. Said list or map shall be made in duplicate and one copy of each shall be filed in the office of the State Engineer, and one copy shall remain in the office of said board of directors for public inspection. Whenever thereafter any assessment is made either in lieu of bonds, or any annual assessment for raising the interest on bonds, or any portion of the principal, or the expenses of maintaining the property of the district, or any special assessment voted by the electors, it shall be spread upon the lands in the same proportion as the assessment of benefits, and the whole amount of the assessment of benefits shall equal the amount of bonds or other obligations authorized at the election last above mentioned."

"Hearing. Sec. 2400. After the board shall have examined the lands in said district, and before proceeding to make the assessment of benefits and the list and apportionment as provided in the last preceding section, they shall give notice to the owners of said lands that they will meet at their office on a day to be stated in said notice for the purpose of making such assessment and list and apportionment. They shall, as far as practicable, give such notice by a postal card mailed or delivered to each of said landowners, and the same shall be mailed or delivered to landowners residing out of the county where said office is located at least ten days before the day fixed for such meeting, and to such as reside in said county it shall be so mailed or delivered at least six days before the time for such meeting. For the purpose of giving notice to non-residents and such owners as it is not reasonably practicable to notify personally or by mail as aforesaid, the notice shall be published in some newspaper published in the same county two weeks before the time of such meeting. At such meeting the board shall proceed to hear all parties interested who may appear, and they shall

continue in session from day to day until the assessment is completed. They shall hear all evidence offered, including any maps or surveys which any owners of lands may produce, and they may classify the lands in such way that the assessment when completed shall be just and equitable. Any person interested who shall fail to appear before the board shall not be permitted thereafter to contest said assessment or any part thereof except upon a special application to the court in the proceedings for confirmation of said assessment, showing reasonable excuse for failing to appear before said board of directors. In case any landowner makes objection to said assessment or any part thereof before said board, and said objection is overruled by the said board, and the landowner does not consent to the assessment as finally determined, such objection shall, without further proceedings, be regarded as appealed to the District Court and to be heard at the said proceedings to confirm as aforesaid."

"Confirmation of Proceedings.

"Sec. 2401. The board of directors of the irrigation district shall file in the District Court of the county in which their office is situated a petition, praying in effect that the proceedings aforesaid may be examined, approved and confirmed by the court. The petition shall state generally that the irrigation district was duly organized and the first board of directors elected, that due and lawful proceedings were taken to issue bonds in an amount to be stated, and that said assessment, list and apportionment were duly made and a copy of said assessment, list and apportionment shall be attached to said petition, but the petition need not state other facts showing such proceedings: *Provided*, That after the organization of the district is complete, a petition may be filed for the confirmation of the proceedings so far, or after the authorization of any issue of bonds such petition may be so filed, and where the procedure is by separate petitions for the con-

firmation of different portions of said proceedings, subsequent proceedings may be in the name of re-opening of the same case, but shall not be considered as authorizing any rehearing of the matter theretofore heard and decided.

"Notice; Rules of Procedure.

"Sec. 2402. The court or judge shall fix the time for the hearing of said petition, and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published in a newspaper published in the same county for four successive weeks. The notice shall state the time and place fixed for the hearing of the petition, and the prayer of the petition, and that any person interested in the subject matter of said petition may, on or before the day fixed for the hearing thereof, demur to or answer said petition. None of the pleadings in said matter need be sworn to. Every material statement of the petition not controverted by answer must be taken as true, and every person or party failing to answer the petition shall be deemed to have admitted all the material allegations of the petition. The rules of pleading and practice provided by the Code of Civil Procedure which are not inconsistent with this title are applicable to the special proceedings herein provided for. A motion for a new trial, and all proceedings in the nature of appeals or rehearing, may be had as in any ordinary suit at law."

"Hearing and Confirmation.

"Sec. 2403. Upon the hearing of such special proceedings, the court shall examine all of the proceedings set up in the petition, and may ratify, approve and confirm the same or any part thereof, and in case of a petition to confirm said assessment, list, apportionment and distribution, the court shall hear all objections either filed in said proceedings or brought up from the hearing before the

board of directors as aforesaid, and for that purpose any person desiring to be heard upon objections overruled by the board of directors, shall state the substance of said objections and the ruling of the board in his answer. The court shall disregard every error, irregularity or omission which does not affect the substantial rights of any party, and if the court shall find that said assessment, list and apportionment are in any substantial matter erroneous or unjust, the same shall not be returned to said board, but the court shall proceed to correct the same so as to conform to this title and the rights of all parties in the premises, and the final order or decree of the court may approve and confirm such proceedings in part, and disapprove other parts of said proceedings; and in case the proceedings for the organization of the district and the issue of bonds are approved, the court shall correct all the errors in the assessment, apportionment, and distribution of costs as above provided, and render a final decree approving and confirming all of the said proceedings. In case of the approval of the organization of the district and the disapproval of the proceedings for issuing bonds, the district shall have the right to institute further proceedings for the issue of bonds *de novo*. The costs of the special proceedings may be allowed and apportioned among the parties thereto in the discretion of the court."

(Sections 2399, 2400, 2401, 2402 and 2403, Idaho Revised Codes.)

Not only is there a possibility that no benefits will be apportioned against the lands of the Plaintiffs in Error, but if it were true as they claim that their lands will not be benefited, then it is a foregone conclusion that they will not be assessed at all, for the State Court has construed the State law on this subject as follows:

"Accordingly, if there are any lands within the Nampa & Meridian Irrigation District which are subject to irrigation from waters received under the contract from the Boise Project, which have a water right in whole or in part, or that will not be benefited by reason of the contract entered into between the United States and the irrigation district, said lands will not be subject to assessment in excess of benefits."

(Page 76 of the transcript in this case.)

It is difficult to imagine how any question could arise under the Idaho Statute quoted above, even if the contract had been signed and the benefits finally determined by the court for this Statute provides for assessing the tax squarely on the basis of the benefits to be received, and the Supreme Court construes that Statute to mean that the land will not be assessed in excess of benefits.

So, when the issue of benefits is tried, if it should be found that the land is not benefited, then no benefits would be apportioned against it, and the owner of such land would not be required to pay any part of the cost of the proposed works, and on the other hand, if any assessment is fixed against the land in question in the apportionment of benefits, it will be because the trial court has found upon the evidence that the land is in fact benefited and benefited more than it will be assessed and that would refute any claim that the owner has been injured. At most it would seem that it would be only a question of the weight of the evidence or the sufficiency of the evidence to support the findings of the court and that is not a question for review by this court.

(Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369.)

At any rate so far as this case is concerned, the question whether the proposed contract will ever actually be signed and become binding on any one, and the additional question whether any assessments will ever be apportioned thereunder against the lands of the appellants by the District Court, and the further question whether the lands of the appellants are or are not already provided with an adequate water right from another source, are all questions for future determination and issues of fact which may never arise so far as any of the parties to this suit are concerned.

A knowledge of the difference between the Idaho Law and the California Law is necessary to a clear understanding of the application of the decisions of this court in the cases of Tregea v. Modesto Irr. Dist., 164 U. S. 179, and New York C. & H. R. R. Co. vs. New York, 186 U. S. 269, to the question now before the court.

Under the California Law the question of benefits or no benefits was finally determined at the time of the organization of the district, so that when the case of Tregea v. Modesto Irr. District was decided, there was no reference to any future apportionment of benefits, for the reason that there was no future apportionment of benefits to be made under the California Law, and the decision of the State Court in that case was based entirely on questions which would have been federal questions (the same federal questions involved in Fallbrook Irr. Dist. v. Bradley) if there had been any real decision at all

except the purely moot question of the mere naked right to make a proposed contract or bond issue which contract was not yet signed and might never be executed, even if the court should affirm the right of the parties to make a contract.

So in the Tregea case this court dismissed the appeal not on the ground that there was no Federal question involved, but on the ground that the state court had not decided any real issue at all, but merely the purely moot question of the mere naked right to make a contract which was not yet signed and might never be signed.

There is no question that the ground for the dismissal of the appeal in the Tregea case applies with equal force in this case and that this appeal should be dismissed on that ground.

But in this case there is another and independent reason why the appeal should be dismissed and that is, that under the Idaho Law, even if the proposed contract should be signed, none of the appellants will be subject to assessment thereunder unless they are benefited and the question of fact as to whether they are or are not benefited is a question yet to be determined by the District Court in a future case, namely, the case to be hereafter brought for confirmation of the apportionment of benefits, but is an issue not properly before the court in this case and the Supreme Court of Idaho has decided against the Plaintiffs in Error on the ground that the issue of benefits was prematurely raised and not properly before the court in this case, that the Supreme Court will not anticipate the action of the District Court on the question of benefits, and that the laws of the State of Idaho do not permit a question of benefit

or no benefit to be raised in such a proceeding as is now before the court.

This brings this case squarely within the rule laid down by this court in the case of New York Central & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. Ed. 1158.

We submit that this case should be dismissed for the following reasons:

1st. The proposed contract was not yet signed, and the question determined by the State Court was the purely moot question of the merely naked right of the parties to make a contract which may never in fact be made.

(Tregea v. Modesto Irr. Dist., 164 U. S. 179, 41 L. Ed. 395.)

2nd. The State Court decided against the Plaintiffs on a non-federal ground broad enough to support the decision, namely, the same ground referred to by this court in the case of New York C. & H. R. R. Co. v. New York, "The ground that the charter of New York" (or the Statutes of Idaho as the case may be) "did not permit a question of benefit or no benefit to be raised in such a proceeding—a ground wholly independent of a federal question."

(New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. Ed. 1158.)

3rd. That the arguments of the Plaintiffs in Error cannot be considered at all without assuming a number of very essential facts which Defendants in Error deny, and which are entirely unsupported by the findings of fact by the court.

ARGUMENT ON THE MERITS.

We think that this appeal should be dismissed on jurisdictional grounds for the reasons named above, but if the case is not dismissed, we contend that the decision of the State Court was correct and should be confirmed.

Examination of the transcript will show that in the hope of securing a review of the assessment of benefits in this proceeding, plaintiffs have included in the transcript irrelevant matter which the State Supreme Court held was wholly immaterial to the issues in this case.

Counsel make reference to the testimony given in support of such matters, as if such testimony constituted the undisputed facts relating to the material issues in the case, regardless of the findings of facts made by the trial court.

An illustration of this practice is found on pages 32 and 33 of the brief of plaintiffs in error with reference to the property and water rights claimed by Mr. Haga.

On page 32 they say:

> "They assessed against the lands of Mr. Haga $20,371.04 which was at the rate of $75.00 per acre for 240 acres, plus drainage (although the land is about five miles from the nearest drain) and reservoir water on an additional 80 acres entitled to water from the Ridenbaugh Canal; they assessed against the lands of Mr. Blucher $7,475.00 which was at the rate of $75.00 per acre for his land (Rec., p. 67). This shows the construction placed upon the contract by the District and the manner in which it proposes to carry it out."

At the bottom of page 40 and the top of page 41 they seek to challenge the reasonableness of the cost per acre for water rights on a recital of facts taken from the reported decision in another suit, regardless of the record in this case.

We respectfully submit that the questions suggested by plaintiffs in error relating to the water rights claimed by Haga and Blucher, the amount of land claimed by Haga, the assumption that any of the lands would be assessed by the district in excess of benefits, or that any of the plaintiffs in error will be assessed any benefits whatever under the proposed contract, should be regarded as eliminated from this case by the decision of the State Supreme Court holding such matters to be immaterial. Upon that point the Court says: (Page 80 of transcript).

> "This case was tried in the District Court upon the theory that this was a special proceeding brought for the express purpose of having the proceedings authorizing the Nampa & Meridian Irrigation District to enter into the contract under consideration examined, approved and confirmed by the District Court. Counsel for appellants have taken the position, and we think erroneously, that this action was brought not only for that purpose but also for the purpose of the apportionment of benefits under sec. 2399, Rev. Codes; and in order to raise this question they alleged in their answer affirmative matters involving it which were wholly immaterial and which should have been stricken from the answer. The cross-complaint and the answer to the cross-complaint were likewise immaterial and were subject to the same motion. The District Court did not find upon any of these matters, for the reason that they were immaterial in this proceeding."

On page 5 of Brief it is asserted that certain landowners filed waivers releasing the district from obligation to furnish water, etc. The findings in this case nowhere support that assertion, and it would be immaterial in any case, for if some parties did file such waivers there is nothing to show that the appellants are the parties who filed the waivers or their successors in interest, and nothing to show that the district accepted the waivers, if any, or that the waivers, if any, applied to anything more than the plan then under consideration for the purchase of the Ridenbaugh Canal and apportionment of the benefits of that purchase.

The further statement, page 5, that the owners of the 44,060 acres not entitled to water from the Ridenbaugh Canal proceeded to acquire water rights from the New York Canal, Settlers Canal, etc., and that others made filings and appropriations under the State Law, and constructed ditches, would be immaterial so far as these appellants are concerned without a finding that the appellants are the parties that did so, and then would be only a question of the amount of benefit which such landowners would receive under the proposed contract and they would not be assessable in excess of benefits. But the findings not only do not show any such facts but flatly contradict the claim that any part of the 44,060 acres which cannot be irrigated from the Ridenbaugh Canal has been irrigated from any other source by finding that the entire 44,060 acres in question is still arid in character. (Finding No. 3, page 45, also finding 5, page 48 of transcript.)

The statement of counsel on page 26 of Brief that "Such

landowners receive no benefit from the district, but are subject to its taxing power, which it agrees in the contract to exercise not in accordance with the benefits received, but so as to collect from the landowner a flat charge of $75.00 per acre on account of principal, etc." which assertion is repeated in various forms many times in the Brief, is entirely outside of the record of facts found in this case, in so far as it asserts that there are any landowners who will receive no benefits, also in so far as it asserts that any landowners not benefited (if there should be any such) would be assessed and is inaccurate and misleading in so far as it refers to the provisions of the proposed contract, and asserts that a flat rate of $75.00 per acre will be apportioned against each acre of project land. This will be seen by reference to the form of proposed contract in the record.

The proposed contract provides:

> "The District will promptly apportion to the project lands in the District a total of $3,304,500, being a charge of $75.00 per acre."
>
> (Par. 12, page 20 of Transcript.)

It will be seen that what the district would agree to do if the proposed contract should be signed, is to apportion a charge of $3,304,500 to the 44,060 acres of dry or arid lands in the district to be irrigated from the irrigation works being constructed by the Government, such lands being referred to in the proposed contract as "project lands."

Of course, the law of the state governing apportionments of benefits is implied as a provision of this contract and the dis-

trict would necessarily be governed by such law in making the apportionment; hence, the propriety of such apportionments cannot be considered until they have been made. These parties will then have their day in court.

The clause "being a charge of $75.00 per acre" is merely explanatory, and is inserted in the proposed form of contract for the purpose of giving the voters a clearer understanding of what this obligation would amount to if distributed at an equal rate per acre. It does not necessarily follow that it would be apportioned at an equal rate per acre.

But the court has found that the entire 44,060 acres is arid, and apparently it is all in equal need of irrigation, and if such is the case an apportionment at an equal rate per acre would be most equitable and would comply with the rule laid down by the Supreme Court of the State for such apportionment.

(Colburn v. Wilson, 24 Idaho, 100 to 105.)

But in any event this is a question for future determination after the District Court has tried this issue and all parties have had proper notice and opportunity to be heard on that issue and even if the contract provided for an improper method of apportionment by the District Board, no improper apportionment would result, for the District Court would correct all errors if it should appear that any errors have been made by the District Board, so that in no event would any land which is not in fact benefited, be assessed nor any assessed in excess of benefits. The findings of the court with reference to this feature of the proposed contract are:

"That at such time there was submitted by the United States of America a proposed contract for supplying full season water rights for use of said lands lying within said irrigation district from the Boise Project of the U. S. Reclamation Service to the amount and value of $3,304,-500."

(Finding No. 6, page 48 of transcript.)

and again in finding No. 11, the proposed obligation is referred to in the following words:

"and for the purchase of a water right from the Boise Project of the U. S. Reclamation Service for the irrigation of 44,060 acres at a cost of $3,304,500 as provided in said contract."

and in finding No. 14 in the following words:

"and for an interest in the Boise Project of the U. S. Reclamation Service in the amount of $3,304,500."

In every case the proposed obligation is referred to as a lump sum, and it does not appear that the apportionment of this sum involves any different principles than those which would be involved in the apportionment of a bond issue of the same amount, except that under the Reclamation Act as amended by the Reclamation Extension Act the Government allows twenty years' time for payment without interest, which in effect gives the landowners the irrigation works at just about one-half what they would cost if the capital to construct the same were secured in any other way. That is to say, on account of the fact that twenty years' time is allowed without interest, a contract to pay the Government $75.00 per acre under the terms of the Federal Reclamation Laws is equivalent

to a bond issue, or other interest bearing charge, of about $35.00 per acre. The advantage to the district in securing irrigation works on such terms of payment is obvious.

We will not take up further time in discussion of the many inaccuracies in the appellants statement of fact.

The facts of this case have been found by the court and appear in the findings, pages 45 to 52 inclusive, of the transcript and differ materially from the facts stated or assumed in the Brief of Plaintiffs in Error.

IF THE COURT SHOULD DECLINE TO DISMISS THE APPEAL, WHAT FEDERAL QUESTION MAY BE INVOLVED IN THIS CASE?

The court will observe that Idaho Supreme Court has expressly limited its decision in this case "to the extent only of determining the legality of the proceedings authorizing the district to enter into the contract with the United States," and has expressly refused to consider the issues tendered by the answers and cross complaints of plaintiffs in error, which were "for the purpose of the assessment of benefits to the lands within the irrigation district." That court has held that these latter questions must all be determined in the suit brought for the purpose of reviewing the assessment of benefits, which suit is now pending in the District Court in the State of Idaho.

The issue in this case relates to the regularity of the proceedings by the district for the purpose of authorizing its officers to enter into the contract with the government.

The findings of the lower court are conclusive upon this question and that court has found the facts as alleged in the

amended complaint; hence, we assume that the legal questions which this court will consider will be limited to those raised by general demurrer to the sufficiency of the amended complaint. We are only able to distinguish two questions of this character suggested in the Brief of Plaintiffs in Error. We would state them as follows:

1. Can the Secretary of the Interior lawfully make use of the class of public corporations known as irrigation districts, or the private corporations known as Water Users' Associations as intermediary agencies between the government and the water user for the purpose of executing the provisions of the law known as the Reclamation Act and Acts amendatory thereof and supplementary thereto, constituting what is commonly known as the Reclamation Laws of the United States?

2. Has the Secretary of the Interior authority to construct drainage works as the complement of, or as an essential part of an irrigation system?

In order to get the facts of the case before the court, without dispute or contention, we call the attention of the court to paragraphs 3, 4, 5, 16 and 17 of the findings which appear on pages 45-52 inclusive, of the record and are as follows:

> "3. That said Nampa and Meridian Irrigation District on or about the first day of January, 1906, acquired what is known as the Ridenbaugh Canal System, which canal system diverts water from the Boise River in Ada County, Idaho, to the lands of said irrigation district, and that said canal system has sufficient capacity to furnish water to approximately 27,000 acres of land in said district and no more. That said lands on which said water supply is used are described in the proposed contract hereinafter

referred to as "Old Water Right" lands. That the said irrigation district has never acquired any other or additional water rights for the irrigation of lands within said district. That approximately 44,060 acres of land in said district are arid and require water for irrigation, and cannot be furnished with water by said District from the present supply, said lands being referred to in the proposed contract as "Project Lands."

"That the United States has been engaged since the year 1904 in constructing an irrigation system known as the Boise Project on the bench lands on the south side of the Boise River in Ada and Canyon Counties in the State of Idaho, a part of said lands bounding Nampa & Meridian Irrigation District, being the lands hereinbefore referred to as "Project lands" lying within said district. That the lands included in the Nampa & Meridian Irrigation District are bench lands on the south side of Boise River in said Counties of Ada and Canyon. That the lands above described as project lands lying in said District are a part of the lands of the Boise Project and said Boise Project is being constructed for the purpose of supplying water to the same, with other lands."

"That said 'Old Water Right Lands' and said 'Project Lands' are intermingled throughout said district and that several thousand acres of said Project Lands were at all times herein mentioned and still are unpatented lands of the United States. That the economical irrigation of said lands requires that water should be distributed to them through joint and not by separate systems of canals for distribution. That the United States through the said Reclamation Service has constructed such a distribution system jointly with the distributing system of the said District and that portions of both said classes of lands are now and for several years past have been supplied with water for irrigation through said joint system of laterals operated and managed by said irrigation district under

an agreement therefor with the said Reclamation Service of the United States. That said Boise Project is supplied with water through what is known as the New York Canal which is the high line canal of said project and that said canal is situated upon the higher lying bench lands that the lands of said district and the land lying between said New York Canal and the said Nampa & Meridian Irrigation District are lands of the said Boise Project and are supplied with water from the said New York Canal as the main distributing lateral of said project. That the seepage water escaping from said New York Canal and the distributing laterals of the said Boise Project, together with the surface waste water resulting from the irrigation of the last described lands of said project and the underground seepage water resulting from such irrigation, naturally move in a northerly direction through and across the lands of the Nampa-Meridian Irrigation District and have their drainage outlet in Boise River. That as a result of the distribution of water for irrigation through said New York Canal and through said Ridenbaugh Canal and the use thereof for irrigation on lands in said Boise Project and in said District, large quantities of seepage water have accumulated on tracts of land in said Nampa & Meridian Irrigation District so as to injure and swamp the same and threaten said lands with destruction; that approximately 2796 acres of the class hereinbefore designated as 'Old Water Right' lands of said District and approximately 1784 acres designated as 'Project' lands of said District were so affected in Nov., 1913. That the area so affected is constantly increasing and said U. S. Reclamation Service through its engineers has made investigations and estimates showing that at the present rate of increase 6449 acres of old water right lands and 5856 acres of project lands will be so affected by the year 1918, and that said lands and other lands of said district will be ruined and destroyed by seepage water unless a drainage system is constructed to protect said

lands from said seepage water. That it is not necessary for such purpose to build more than a single drainage system. That said seepage conditions result from the use of water for irrigation from Boise Project and upon the 'Old Water Right' lands of said District as a community and does not result entirely from either source, but result jointly from the water seeping from said canals and each of them and from the water escaping as surface waste water and underground seepage water from all of the above described lands. That by the provisions of said proposed contract, hereinbefore mentioned, the said parties thereto propose the construction of a suitable drainage system for the purposes hereinbefore mentioned, the expense thereof to be borne jointly by the United States and the said Irrigation District. That the total cost of said drainage system as planned and estimated by the United States Reclamation Service is the sum of $557,000.00 and after careful negotiation between the officers of the said Reclamation Service and the officers of said Irrigation District, and investigation by the engineers of the United States Reclamation Service and of said District, said parties have jointly concluded that the sum of $291,000.00 of said expense should be borne by the United States and $266,000 should be borne by the said Irrigation District and they propose by said contract to jointly bear said expense in said proportion."

"4. That when the said Boise Project was first promoted, the landowners owning land in said project organized the certain corporation known as the Payette-Boise Water Users' Association, Ltd. That said corporation was organized at the instance of the United States Reclamation Service for administration purposes and as a means whereby the said United States Reclamation Service might deal collectively with said landowners organized as a co-operative corporation. That all landowners desiring water rights from said Boise Project were required to purchase stock in said corporation and to enter

into contracts for securing water rights for their lands from said Boise Project. That said contracts were all of the same general character, a copy of which is to the amended complaint attached as Exhibit "C" and were duly recorded in the Recorder's office of the County wherein the land affected thereby was situated. That the water rights distributed by the said District from said Ridenbaugh Canal System are not full season rights but are subject to cut in the latter part of the season when the water supply of the Boise River is diminishing, particularly in dry seasons. That during the years 1905, 1906 and 1907 a large number of landowners in said District receiving water from said Ridenbaugh canal system entered into agreements of the character above mentioned for the purpose of securing a supplemental water supply of stored water from the Boise Project for use on their said lands during the period of low water. That at such time it was uncertain and doubtful whether stored water was needed to supplement said water rights from the said Ridenbaugh System. That a large number of said landowners contracting for said stored water have now reached the conclusion that such stored water is not necessary for the irrigation of their said lands and are desirous of being released from their said contracts. That by the proposed contract hereto attached as Exhibit "B" the said parties agree to cancel and release said contracts for stored water and to permit landowners to purchase from the United States such amounts of stored water through said district as have been applied for by the said landowners and no more, the same amounting approximately to 828 acre feet, costing $24,840."

"5. That there are within the boundaries of the said Nampa & Meridian Irrigation District 44,060 acres of land which the said District is unable to supply with water for irrigation from the canals and water rights now owned by the district, being the lands herein referred to as the 'project' lands of the district. The said lands are

arid in character and require water for irrigation in order to produce crops. That the said Boise Project has been constructed for the purpose of supplying said lands with water. That by the terms of the proposed contract, the United States offers to sell to the district water rights for said lands, upon terms named in said contract and which are satisfactory to the district."

"16. That the Payette-Boise Water Users Association, Ltd., is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho; that during the years 1905 and 1906 a large number of the landowners within the Nampa and Meridian Irrigation District signed stock subscription contracts with the said corporation known as the Payette-Boise Water Users Association, Ltd., providing for the payment of their proportionate shares of the cost of the construction of the Payette-Boise Project to be constructed by the Government under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388) known as the Reclamation Act; that at the time the landowners signed the above mentioned contracts for water stock in said corporation it was agreed that a credit of $14.00 per acre should be allowed to such landowners in the Nampa and Meridian Irrigation District on account of the value of existing works and rights of the district for said credit to be allowed as a partial offset against the charge of the Payette-Boise Project; that on account of the changes in the plans of the Payette-Boise Project and the increase in the public cost of water rights it was found that the credit of $14.00 per acre which would be allowed to the said lands of the Nampa and Meridian Irrigation District for its existing works and rights was too small to be equitable and fair; that said contract has been proposed for the purpose of properly adjusting the matters between the said Payette-Boise Water Users Association, Ltd., and the United States which furnished the money to construct the works of the Payette-Boise Project and to increase the water supply of

said District and relieve the over-wet lands within the district."

"17. That under the proposed plan adopted by the Board of Directors of the Nampa and Meridian Irrigation District, a part of which plan is the proposed contract between the United States of America and the Nampa and Meridian Irrigation District, together with the water rights acquired by appropriation, the Nampa and Meridian Irrigation District will secure and furnish sufficient water to the lands of the District which were heretofore signed up in the Payette-Boise Water Users Association, Ltd., and therefore it will be no longer necessary that these lands should individually contract for water from the government; that the Board of Directors of the Payette-Boise Water Users Association, Ltd., have heretofore duly passed a resolution approving said proposed contract between the United States of America and the Nampa and Meridian Irrigation District, in principle and general form."

(Pars. 3, 4, 5, 16 and 17, pages 45 to 52 inclusive of Transcript.)

It will be observed that the contract between the United States and the District contains three principal items, to-wit:

First: The purchase by the district from the government of water rights for 44,060 acres of arid land within the boundaries of the district, which lands constitute a part of the project lands for the reclamation of which the Boise Project was constructed originally.

Second: The purchase by the district of stored water from the Arrowrock Reservoir of the Boise Project to the value of $24,840.00 to be used in supplementing water rights of the district which are not equal to a full season right.

Third: The construction of a joint drainage system for the State Project lands and the lands of the district supplied with water from other sources.

The first of these is challenged only by the Plaintiffs in Error, Haga and Blucher. None of the other Plaintiffs in Error make any claim to ownership of land, for which water rights are to be secured under this contract. Plaintiffs in Error, Haga and Blucher, are the only dissatisfied parties among the landowners interested in the 44,060 acres of arid land.

These landowners would be very foolish indeed to complain of a contract which makes their heretofore worthless land immensely valuable; hence, they make no complaint against this contract but are earnestly in favor of it.

The opposition of Haga and Blucher is easily accounted for, since they allege that they can reclaim their land by means of certain pretended water rights commonly known as waste water rights, resulting from the purchase and use of Government water by their neighbors (see pages 58 and 59 of transcript) by which means they are attempting to secure a part of the water supply made available by reason of the construction of the Government project without paying for it, a form of attempted parasitism, which, if successful, would shift onto the other water users a larger share of the burden both of the construction costs and operation and maintenance costs of the irrigation works which impound and divert the water from Boise River and make irrigation possible for all alike.

Referring to the Haga and Blucher claim, the Idaho Supreme Court has expressly held that they will receive ample legal protection in the suit to confirm the assessment of benefits and has held that the signing of this contract by the Secre-

tary of the Interior and the district will not estop them from asserting their rights in that proceeding.

No exception is made to the provision for supplemental water. None of the Plaintiffs in Error will be affected by that provision of the contract. None of the Plaintiffs in Error will be affected by the contract for drainage unless the benefit is assessed against their land; in which event, they will have their day in court for the purpose of challenging the assessment.

We respectfully submit, therefore, that the signing of this contract by the Secretary and the district does not preclude Plaintiffs in Error from asserting all of the rights claimed by them in their answers and cross-complaints in the proceedings for review of the assessment of benefits.

At the bottom of page 30 of their Brief Plaintiffs in Error say "it is alleged in the petition and found by the court that the contract containing three separate and independent propositions was submitted to the voters of the district at an election called for such purpose, although there was no authority under the Idaho Statutes for submitting any such contract to a vote of the people; and it is conceded that at such election the voters were compelled to vote either "Contract—Yes" or "Contract—No." They had no opportunity to vote for or against any one or two of the three propositions.

Examination of the Idaho Statutes under which this election was held will show that there is but one "proposition" that the district could submit to these voters under the statute and that proposition must consist of a plan for the acquirement of irrigation works. In the case at bar the "plan" consists of the

purchase of an interest in works already constructed by the Government sufficient to irrigate 44,060 acres of completely arid land, together with certain stored water to supplement the old water rights of the district; and also the construction of a joint drainage system to protect the lands of the district from seepage water, resulting from the irrigation works of the district. As we shall show later in this brief, the Supreme Court of the State of Idaho has held that it is the duty of the irrigation district to construct such drainage works as the complement of its irrigation system. Hence, it will be observed that this contract did not relate to "three separate and independent propositions," but all of its provisions were strictly germane to the one purpose authorized by law, which was the construction or acquirement of irrigation works.

As we can only anticipate the probable questions which this court will consider as involved in this case, we will first discuss the authority of the Secretary of the Interior to make this contract.

The State Court decided that the District has authority to construct drainage works and to contract with the United States for that purpose, that the District has authority to make the proposed contract, that the Association has authority to make the proposed contract, and that the Secretary of the Interior has authority to make the proposed contract.

The District and the Association are both Idaho corporations, one a public or municipal corporation, and the other a private corporation, and the decisions of the State Court as to the interpretation of the State Laws and the extent of the au-

thority which the State Laws give to such corporations is conclusive. The Idaho decisions on these questions are reviewed by the State Court to some extent in the opinion in this case, but will be found somewhat more fully discussed in some of the earlier Idaho cases.

The chief Idaho decisions on these questions are the following:

Pioneer Irr. Dist. v. Stone, 130 Pac. 382.

Bissett v. Pioneer Irr. Dist., 120 Pac. 461.

Hillcrest Irr. Dist. v. Brose, 133 Pac. 663.

Nampa & Meridian Irr. Dist. v. Petrie, 153 Pac. 425.

which last is the case now before the court.

Before beginning the discussion of the Federal Statutes known as the Federal Reclamation Laws, and the authority of the Secretary of the Interior thereunder, it is in point to observe that it is not every question arising under a Federal Statute which can be reviewed on Writ of Error from the Supreme Court of the State to the Supreme Court of the United States, but only:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute

> of or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority. * * * "

The Plaintiffs in Error have not relied on any right under the Federal Reclamation Laws, and the State Court has not decided against the validity of the Federal Statute, but to the contrary has sustained the validity of the Federal Statute.

The appellants' claim is that the irrigation district laws of the State of Idaho deprive them of their property without due process of law and deny them the equal protection of the law in violation of the provisions of the Federal Constitution. This question does not necessarily require the interpretation of the Federal Reclamation Laws, for the State Court did not hold against the validity of the Federal Reclamation Laws, but sustained the validity thereof.

The question raised is the same that was tried out in the case of Fallbrook Irrigation District v. Bradley, 304 U. S. 112, 41 L. Ed. 369, except that in the case now before the court no property has yet been taken and no assessment finally determined, and there is no certainty that any ever will be.

All of the arid land states have adopted Irrigation District Laws modeled on the Wright Act of California, most of them quite similar to the Idaho Statute.

For a time preceding the decision of this court in the case of Fallbrook Irrigation District v. Bradley, the question of the constitutionality of such statutes and the question whether the purpose involved is a public purpose, was much discussed and

was open to debate, but since the decision in the Fallbrook case, it has been considered both by the courts and the text-writers as a question finally decided and no longer open to any kind of argument.

(Wiel on Water Rights in the Western States, 3rd Edition, par. 1356, pages 1249-1250.)

(Long on Irrigation, par. 135.)

(Kinney on Irrigation & Water Rights, 2nd Edition, pages 2529 to 2540.)

and numerous cases cited therein.

The whole question is so completely covered by the decision in the Fallbrook case that it seems unnecessary to go farther than to cite that case.

The questions decided in that case as set out in the syllabus are as follows:

"1. If a state statute violates any provision of the Federal Constitution, it is the duty of this court to so decide, but if it does not, Federal courts are not justified in running counter to the decisions of the highest state court upon questions involving the construction of state statutes or Constitution, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

"2. Whenever a state law imposes a tax, assessment, servitude, or other burden upon property for the public use, either of the whole state or a limited portion thereof, and such law provides a mode of confirming or contesting such charge in the ordinary courts of justice, with due notice to the owner, the judgment in such proceedings does not deprive the owner of his property without due process of law."

"3. The question whether private property has been taken for any other than a public use is a Federal question, notwithstanding the absence of any prohibition in the Federal Constitution which acts upon the states, against their taking private property for any but a public use, when the taking for any other use is alleged to be a deprivation of property without due process of law."

"4. The decisions of the California courts that the irrigation act of that state does not deprive the landowner of property without due process of law, and that the use of water for irrigation under the act is a public use, and the declaration of the people and legislature of the state to a similar effect in their Constitution and statutes, are to be treated with very great respect by this court, but they are not absolutely binding on it as to what is due process of law, and, as incident thereto, what is a public use."

"5. The fact that the use of the water under such act is limited to the landowner, and is not given to every resident of the district, does not prevent the use being public."

"6. That the water is apportioned by such act ratably to each landowner upon the basis of his assessment, with the right to assign the whole or any portion of his share, does not amount to a distribution to individuals and not to lands, whereby the use for irrigation may not be achieved, nor alter the use from a public to a private one, as all persons have the right to use the water under the same circumstances."

"7. The irrigation of arid lands under the California act is a public purpose and the water thus used is put to a public use."

"8. Land which can be beneficially used to a certain extent without irrigation may yet be so much improved by it that such land can properly be included in an irrigation district, and assessed for the benefit of the artificial

irrigation as a public improvement, and such use of water is a public use."

"9. As the board is to hear the petition upon notice, and is not to include land which will not be benefited, it follows as a necessary implication that the persons interested have the right to appear before the board and contest the facts upon which the petition is based and as to the benefit to any particular land included in the proposed district."

"10. Unless the legislature decides the question of benefit itself, the landowner has the right to be heard upon that question before his property can be taken; but the act provides for such a hearing and also for a hearing upon the question of the valuation of and assessment upon his land."

"11. The adoption of an *ad valorem* method of assessing the lands in an irrigation district for the expense of the improvement is not a taking of the property without due process of law."

"12. Legislative power is not delegated by enacting conditions upon the performance of which an irrigation district shall be regarded as organized within boundaries fixed by a board of supervisors after a hearing and a vote of electors therein in favor of the incorporation."

(Fallbrook Irr. Dist. v. Bradley, 304 U. S. 112, 41 L. Ed. 369.)

Counsel seek to distinguish the present case from the case of Fallbrook v. Bradley by arguing that under the Idaho Statute the water rights are appurtenant to the land and therefore the landowner cannot sell any surplus water.

In this respect counsel seem to be laboring under the mis-

apprehension that if a water right is appurtenant to the land it is inseparable from the land.

Under the Idaho Law all water rights are appurtenant to the land, but they are not inseparable from the land.

> (Hard v. Boise City Irr. Co., 9 Idaho 589, 76 Pac. 331.)

Moreover, the explanation in the Fallbrook case, that the landowner can sell his surplus water, if any such be charged to him, is in justification of the inequalities of the California Law in apportioning charges on the basis of the full cash value of the lot or farm under which system some owners are required to pay far more than would have been their share if apportioned according to benefits and in some cases would be entitled to a great deal more water than they had any use for, but no such justification is necessary under the Idaho Law, the assessments are apportioned squarely on the basis of the benefits received and there is no reason to suppose that any landowner will receive or pay for any water rights or other benefits except what are needed for the irrigation of his own land.

So whether he sells his water rights or not, in no case does he pay for anything more than the benefits received.

Is an irrigation district a suitable means whereby the Secretary of the Interior may deal collectively with owners of arid lands?

Respondent is an irrigation district under the laws of the State of Idaho.

An irrigation district is a quasi-municipal corporation, organized for the specific purpose of providing ways and means of irrigating lands within the district and maintaining an irrigation system for that purpose.

Colburn v. Wilson, 23 Idaho 337, 130 Pac. Rep. 381.

Pioneer Irr. Dist. v. Walker, 20 Idaho 605, 119 Pac. Rep. 304.

Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

"The irrigation of arid lands is a public purpose and the water thus used is put to a public use."

(Fallbrook Irr. Dist. vs. Bradley, *supra.*)

THE FEDERAL STATUTES AUTHORIZE THE SECRETARY OF THE INTERIOR TO MAKE THE PROPOSED CONTRACT.

The Reclamation Act of June 17, 1902, (32 Stat. 388), appropriates the receipts from the sale of public land in the western states, as a trust fund to be invested by the Secretary of the Interior in the construction of works for the reclamation of arid land, and makes it the duty of the Secretary of the Interior to see that the trust fund thus invested is safely invested and secured and in due time collected without interest, but undiminished as to principal, from the landowners who receive the benefits of the irrigation works, to be again used in the construction of other irrigation works.

"That fund was the proceeds of public land and was not intended to be diminished for the benefit of any one

project, but without increase by interest, and undiminished by local expenses, was again to be used for constructing other works. The cost of surveying those projects which were not developed and the administrative expenses not chargeable to any particular project might not be repaid, but these sums were so small as to be negligible as against the fundamental idea of the bill, that the proceeds of public land as a trust fund should be kept intact, and again invested and reinvested for constructing new irrigation works."

(Swigart v. Baker, 229 U. S. 187, 57 L. d. 1143.)

But Congress left it to the discretion of the Secretary of the Interior to select the means or agency which he should consider best adapted to accomplish the purpose of reclaiming the land and securing the safe return of the money invested.

In this case, by submitting to the district the proposed contract and announcing that he would sign the same and proceed to furnish the water rights, and construct the works described therein, provided the proposed contract is duly authorized by the electors of the district and the proceedings duly confirmed by the courts, the Secretary of the Interior has in effect selected the district as the means to be used in this case and announced that he will furnish water rights for the 44,060 acres of arid land in the district only through that agency. The provisions of the Act of Congress of February 21, 1911 (36 Stat. 925), known as the Warren Act and the Act of Congress of August 13, 1914 (38 Stat. 686), known as the Reclamation Extension Act, show that Congress contemplated that the Secretary of the Interior might use Irrigation Districts for this purpose.

Sec. 2 of the Warren Act provides:

"That in carrying out the provisions of the said Reclamation Act, and acts amendatory thereof, or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with *irrigation districts*, water users associations, etc., for the construction or use of such reservoirs, canals or ditches as may be advantageously used by the government and irrigation districts, water users associations, etc., * * * for impounding, delivering and carrying water for irrigation purposes."

And the Reclamation Extension Act provides:

"Sec. 7. That the Secretary of the Interior is hereby authorized, in his discretion, to designate and appoint, under such rules and regulations as he may prescribe, the legally organized water users' association or irrigation district, under any reclamation project, as the fiscal agent of the United States to collect the annual payments on the construction charge of the project and the annual charges for operation and maintenance and all penalties: *Provided*, That no water right applicant or entryman shall be entitled to credit for any payment thus made until the same shall have been paid over to an officer designated by the Secretary of the Interior to receive the same."

The Idaho Court has said with reference to the authority of the Secretary of the Interior to make such a contract with an irrigation district:

"It would seem to us that the Secretary of the Interior has the power to enter into such a contract under the provisions of the Act of June 17, 1902, known as the Reclamation Act (Act June 17, 1902, c. 1093, 32 Stat. 388, U. S. Comp. St. Supp. 1911, p. 662). The United States Circuit Court of Appeals, in Burley v. United States, 179 Fed. 1, 102 CCA 429, 33 L. R. A. (N. S.) 807, seems to have entertained the same view and held that the Secretary has power to enter into contracts such as the one

under consideration. If, however, there sould have been any question or doubt on this subject, it seems to us that all such doubt should have been dissipated by the provisions of the Act of Feb. 21, 1911, c. 141, 36 Stat. 925 (U. S. Comp. St. Supp. 1911, p. 681), known as the Warren Act, which act specifically provides for and authorizes contracts such as the one under consideration."

(Pioneer Irr. Dist. v. Stone, 130 Pac. 382.)

By a process of natural selection the easiest and cheapest projects are built first and the irrigation projects remaining to be built become from year to year increasingly costly and difficult and in most cases those now remaining are too costly to be feasible at all unless all the land that can be reclaimed under the proposed work is brought into the project and required to bear its fair share of the cost of the necessary irrigation works. Consequently, there are many projects which would not be feasible, and could not be built at all except by means of cooperation with Irrigation Districts.

Since the irrigation district is the owner of an irrigation system, it is legally obliged to exist and perform the duties imposed by law, both in relation to the old water right lands and to dry lands which may demand water from it, and this latter demand can only be met by the contract now before the court.

The Secretary of the Interior has now reached the conclusion that the irrigation district is the better agency for dealing with the landowner. At some time or other, it will be necessary to turn over the irrigation works of the project to some organization representing the landowners. The Water Users'

Association is merely a private stock corporation, while the irrigation district is a public corporation.

The advantages of the latter class of corporation in cases of this character are apparent. The Government has constructed at great expense an irrigation system of sufficient capacity to supply all of these lands. Otherwise, the lands would have no value whatever. But the owners of thousands of acres of the lands refuse to sign up with the private corporation known as the Water Users' Association and it has no jurisdiction to compel them to do so. Why do they not sign up? The evidence offered by defendants—the only evidence they offered—is very suggestive. The use of water on the major part of the dry lands will create a supply of waste water subject to appropriation. Hence here is an opportunity for getting a water right without paying for it. Why should part of the community furnish a free water right for the balance? Simply another form of selfishness which must be restrained in the interest of the whole community. It is the right and the duty of the irrigation district to secure water for the dry lands and it can force the landowners to ratably and equitably pay for the same.

Hence, it is not surprising that the Secretary of the Interior, acting within the jurisdiction created by law, has concluded that the district is preferable and more efficient than the Water User's Association.

Among other advantages which have no doubt influenced the Secretary of the Interior in his choice of the Irrigation District as the best agency for the collection of the water right

charges from the project lands of the district, may be mentioned the fact that the old water right lands of the District and the dry lands to be supplied from the Government works are intermingled very much like the black and white spots of a checker-board, and as the District must necessarily handle the operation and collection in connection with its old water right lands, it can best operate and collect for all the lands in the district, thus avoiding the duplication of all the forces of operation, administration and collection, and the possible conflict of authority which would result if one agency attempted to collect and operate for the black spots and another for the white spots of the checker-board.

Another advantage of the district plan of organization is that water rights can be furnished at less cost per acre and the works can be operated each year at less cost per acre, if all the land in a given territory takes water rights than they can if a part of the lands under an irrigation system take water rights, and a part remain dry. The District can contract for water rights for all the lands of the District, which will be benefited by irrigation, while any other plan would require individual applications and as a thousand men will never all agree, the probability is that a portion of the land would remain dry to the detriment of the whole community, increasing the cost to those who take water rights and maintaining unproductive areas in the midst of the irrigated community, a harbor for rabbits and other pests.

It is evident that the Secretary of the Interior has very good

reason for exercising the choice which Congress has given him in favor of the Irrigation District.

STOCK SUBSCRIPTION CONTRACTS.

The Plaintiffs in Error refer in their Brief to the fact that certain landowners in the District have signed stock subscription contracts in the Payette-Boise Water Users' Association, and allege by inference at least that such stock subscription contracts constitute water rights, and that for this reason, such landowners should not be assessed by the District for any part of the benefits of the water rights to be purchased by the District from the Government under the proposed contract.

With reference to this claim it will be observed:

1st. It is a question which goes to the matter of the apportionment of benefits, a future issue not before the court in this case.

2nd. The facts as found by the court do not indicate that any of the appellants have made such stock subscription contracts, so the question is immaterial so far as they are concerned.

3rd. The form of stock subscription contract, a copy of which appears on page 23 of the transcript, shows that it is in no sense a water right from the Government project, or any other source. The United States is not a party to the contract. The Association has no water rights or irrigation works. It is merely an organization of landowners who hope to secure water rights from the United States. Under the provisions of the stock subscription contract the signers thereof agree among

themselves that they will apply to the United States for water rights from the Boise Project, but it is entirely optional with the Secretary of the Interior whether he will accept such applications or reject the same.

AS TO ACREAGE HELD BY ANY ONE PERSON IN EXCESS OF 160 ACRES.

Section 5 of the Reclamation Act of June 17, 1902 (32 Stat. 388), provides:

> "No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made."

Section 2 of the Warren Act (Act of Feb. 21, 1911, 36 Stat. 925) contains the same restriction as to selling water rights for more than 160 acres in the ownership of any one person, but omits all reference to residence.

It does not appear that any land in the District is held by non-residents, and no one has appeared to raise any objection on that ground, but it appears that O. O. Haga, one of the Plaintiffs in Error, claims to own 320 acres of land in the District. This claim is found in the irrelevant oral testimony improperly and prematurely injected into this case for the purpose of showing benefits or lack of benefits, but was disregarded by the court because the issue of benefits was not before the court in this case, the necessary notices of hearing on that question had not been published and the time had not

yet arrived when it would be permissible under the State Law for the District Court to pass upon that question.

Consequently the facts of this case, as found by the court, offer no support for the claim that Mr. Haga or any one else owns any land in excess of 160 acres.

It appears to us that the issue does not arise in this case.

If, when the court comes to try the issue as to the apportionment of benefits, it should appear that Mr. Haga holds more than 160 acres of land, then it will be necessary to inquire whether it is separate property or community property, and if it is community property, it is not held by any one person, but is held by two persons under a form of joint ownership, or ownership in common, and the acreage that each would be considered as holding would be determined under the rule laid down by the Department in the case of Heirs of DeWolf v. Moore, in which the Department decided:

> "In estimating the acreage of an undivided fractional interest in real estate, for the purpose of determining a homestead applicant's proprietorship within the meaning of Section 2289 R. S. as amended by Sec. 5 of the Act of March 3, 1891, he shall be charged with that portion of the total acreage of the land owned by him in common with others which is represented by the fractional extent of his undivided interest."

(DeWolf v. Moore, 37 Land Decisions 110.)

If it should be found that Mr. Haga owns 320 acres of land in the district, and that it is separate property and not community property, then it becomes a question of the amount of the benefit to such a tract of land, which would be derived

from having a water right assessed to it subject to the condition that the water right could not be used on more than 160 acres until the surplus acreage is sold or transferred. It may be true and usually would be true that the owner of arid land would be immensely benefited by having water rights made available for his land, even though the water cannot be used on part of the land until the excess acreage is sold or transferred; for arid land is worthless without water, but when water is made available for irrigation it becomes valuable and salable, and if the necessary capital for the construction of the irrigation works is secured from the Government on twenty years' time without interest, the freedom from interest charges makes the payments of the landowner just about one-half what they would be if the capital were secured by sale of interest bearing bonds, and the favorable terms of payment under the Government Reclamation plan would be an additional benefit to the land, resulting in a higher value and more ready sale, than would be secured if the irrigation works were constructed with money secured by the sale of bonds.

Where it is necessary to determine the extent of the benefit of any special improvement, such as sewers, sidewalks, paving or irrigation to any particular tract of land, it is not the extent of the use which the owner of such property is likely to make of such improvement that controls the amount of the tax.

(Oregon Short Line v. Pioneer Irr. Dist. (Idaho), 102 Pac. 904.)

The hopeless cripple who can never walk a step pays the same sidewalk tax as his neighbor, the mailcarrier, and the

man without either horse or auto pays no less paving tax than the adjoining lot owner who has both. Like the cost of constructing canal capacity, the cost of installing sidewalks or paving is the same whether it be used little or much, and if the special improvement is such that it may be expected to have a favorable effect upon the market value of the property, such effect on the market value is the best of evidence of a special benefit which will sustain the special assessment.

> "We have frequently declared it to be the general rule, the inquiry as to benefits is to what extent the market value of the premises will be enhanced by the improvement."
>
> "The measure of benefits from a local improvement to city lots owned by a street railroad company is the enhanced value of the property by reason of the construction of the improvement, notwithstanding the use is restricted to railroad purposes."
>
> (Union Traction Co. v. City of Chicago, 204 Ill. 363, 68 N. E. 519.)

> "Undoubtedly, the simplest, fairest and most just rule, and one that best conforms to the underlying theory of local assessment, is that the existence and amount of special benefits is to be determined by the effect of the improvement upon the market value of the property which it is claimed is benefited by such improvement. If the construction of such improvement increases the market value of such property, such property receives a benefit and the amount of such benefit is measured by the amount of such increase."
>
> (Page & Jones Taxation by Assessment, par. 653, and cases there cited.)

Moreover, this land is receiving the additional benefit of drainage outlets.

And furthermore, the lands of an irrigation district are assessable for general benefits to the district as a whole, and this land will receive considerable indirect benefit from the irrigation, drainage, and general improvement of the whole district bringing with it as it does better roads, schools, markets, etc., which tends to increase the value of the land as well as the comfort and convenience of the farmer. Irrigation district lands are assessable for general benefits as well as special benefits.

> "The benefit of the water supplied to owners of land within the district, as provided by Section 2407 means such benefits as contribute to promote the prosperity of the district and add value to the property of the respective owners of the entire district, and such improvement of land in any portion of the district adds to and increases the value of the lands of the entire district as the water is applied and devoted to a beneficial use by the owners through said system."
>
> (Colburn v. Wilson, 24 Idaho 103, 132 Pac. 579.)

> "The mere fact that the railroad company for the time being is using its lands for right of way and depot purposes is not a reason why such land will not be benefited by a system of irrigation works controlled by an irrigation district, as the question of benefits *is to be determined with reference to the natural state and condition of the land* and not with reference to the use being made of such land."
>
> (Oregon Short Line v. Pioneer Irr. Dist. (Idaho), 102 Pac. 904.)

The State Court has discussed this question of the 160-acre limitation in the following language:

"The contract in question provides, among other things, that 'The District agrees to distribute the amount of water delivered to it by the United States under this contract in full compliance with the provisions of said Reclamation Act of June 17, 1902, and the rules and regulations thereunder, and to use and distribute the same only upon the lands within the District, and in compliance with the provisions of Section 2 of the Act of Congress of February 21, 1911 (36 Stat. L. 925), known as the Warren Act."

"Sec. 5 of the Reclamation Act of June 17, 1902, *supra*, among other things, provides: 'No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner unless he be an actual bona fide resident on such land or occupant thereof residing in the neighborhood of said land * * *.' "

"Sec. 10 of said act provides: 'That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.' "

"The Secretary, in order to carry out the purpose of the reclamation act and in pursuance thereof, issued a general reclamation circular during the year 1909, and reissued said circular from time to time, the last being on February 6, 1913. In this circular, the Secretary of the Interior fixed a limit of residence in the neighborhood of said land at a maximum of fifty miles, and further provided that this limit of distance may be varied depending on local conditions. This circular also restricted the right to the use of water obtained from a government project by any one landowner to 160 acres of irrigable land."

"The act of Congress of February 21, 1911, known as the Warren Act (36 Stat. at L. 925), in Section 2 provides: That in carrying out the provisions of said recla-

mation Act and Acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users, associations, corporations, entrymen or water users for impounding, delivering, and carrying water for irrigation purposes: * * * Provided further, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: * * *"

"The act of Congress passed August 13, 1914, known as the Reclamation Extension Act, sec. 7, provides: 'That the Secretary of the Interior is hereby authorized in his discretion to designate and appoint, under such rules and regulations as he may prescribe, the legally organized water users' associations or irrigation district, under any reclamation project, as the fiscal agent of the United States to collect the annual payments on the construction charge of the project and the annual charges for operation and maintenance and all penalties. * * *"

"It will, therefore, be observed that the act of congress of February 21, 1911, known as the Warren Act, and the subsequent act of congress passed August 13, 1914, known as the Reclamation Act, make no provision for residence upon the lands to be irrigated from the waters of a government project. The Acts of June 17, 1902, and of February 21, 1911, both provide, however, that water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate 160 acres. Consequently, any owner of land within a government project or an irrigation district cannot secure the

use of water from a government project in excess of an amount sufficient to irrigate 160 acres, whether he owns more than that amount of acreage in such district or not."

"The regulations of the Secretary of the Interior heretofore referred to contain the following provision: Holders of more than 160 acres of irrigable land within a Reclamation Project must sell or dispose of all in excess of that area before they can receive water.' "

"The contract proposed to be entered into between the United States and the Nampa & Meridian Irrigation District, as before stated, provides that the district will distribute the water to the purchasers of water rights under the acts of Congress and the regulations of the Secretary of the Interior, *supra*. This provision of the contract is strenuously protested against by appellants for the reason, as they contend, that a landowner within the district who owns land in excess of 160 acres would be forced to dispose of all the lands he possesses in excess of 160 acres, or suffer the consequences of being taxed for all his lands, yet be denied water for the same in excess of 160 acres. The restriction under the above regulation is to the use of the water. The landowner who has land in excess of 160 acres may permit the whole thereof to be assessed with a government water right rather than insist that only 160 acres be so assessed, as, although he might be able to secure only enough water to irrigate 160 acres for his own use, the balance of his land would be provided with a permanent water right which he might dispose of within a reasonable time; or, upon the apportionment of benefits, it may be determined that none of his land would be liable to assessment of benefits for a water right, or that no greater portion of his land than 160 acres would be susceptible of irrigation and to the assessment of benefits."

"There can be no doubt that Congress has the power to restrict the right to the use of water furnished from

government projects to 160 acres standing in the name of an individual, but we do not think that body would assume authority to control the benefits which might be assessed to lands within an irrigation district organized under the laws of this state."

"The United States, through the Reclamation Service, has at a great expense constructed the Boise Project, whereby it acquired for sale and distribution ample water for the proper irrigation of the lands under said project, as well as a surplus sufficient in amount to properly irrigate the arid lands and supplement the now inadequate supply of water within the Nampa & Meridian Irrigation District, and has offered to the irrigation district the right to the use of said surplus water under the stipulations contained in the proposed contract. Having the authority under the law to dispose of the right to the use of water thus acquired, it is in a position to fix the terms and conditions of its use, subject to the power of the court to assess benefits within the district."

"We are, however, aware of no valid reason why we should anticipate the final action of the district court in assessing the benefits to landowners within the irrigation district who own land in excess of 160 acres. To do so would, in effect, require the district court in this proceeding to definitely fix the benefits to be assessed at a stipulated sum and thus deprive each owner of the land within the district of the right which he has under the statutes of this state to prove that his particular lands would not be benefited by reason of the application of water under the contract."

"Should the district court reach the conclusion that a landowner who holds title to lands in excess of 160 acres receives no benefits, or that his benefits would be limited to only 160 acres or less of land, the objection so strenuously urged against this provision of the contract would be untenable. That being true, it necessarily follows that

the objection raised at this time to the authority of the irrigation district to enter into the contract with the government by reason of the fact that possibly a serious injustice may be done to landowners within the district who own lands in excess of 160 acres before the assessment of benefits have been made, cannot be considered in this proceeding."

(Pages 77, 78, 79 and 80 of Transcript. Reported Nampa & Meridian Irr. Dist. v. Stone, 153 Pac. 425.)

AUTHORITY OF SECRETARY OF THE INTERIOR TO CONSTRUCT DRAINAGE WORKS UNDER THE RECLAMATION ACT.

The same reasons which have led irrigation districts to engage in the construction of drainage works in order to remove the surplus water brought upon the land by irrigation, and have led the State Court to declare that irrigation districts not only have the power to construct such drainage works, but that it is their duty to do so, have led the Secretary of the Interior to construct more or less drainage work on almost every project undertaken under the Reclamation Act.

In its most recent decision on this subject, the Supreme Court of this State has said with reference to the construction of drainage works by irrigation districts:

"This Court has held that an irrigation district may construct drainage works as *a necessary complement of its irrigation system.*"

C. G. Burt et al., Com. Drainage Dist. No. 1 v. Farmers Coop. Co. et al., (filed Sept. 29, 1917), 30 Idaho 752.

Bissett v. Pioneer District, 21 Idaho 98, 120 Pac. 461.

Pioneer Irrigation Dist. v. Stone, 23 Idaho 344, 130 Pac. 382.

We think these decisions plainly hold that the drainage system which an irrigation district is authorized to construct constitutes, from a legal point of view, a component part of its irrigation system, being in fact the complement thereof. We understand the word "complement," as here used, to mean "that which completes."

The court has taken judicial notice of the seepage conditions which almost invariably result in due time from irrigation and declares in effect that an irrigation district is incomplete until provision is made for drainage and that the jurisdiction to purchase the irrigation system carries with it the positive duty of providing the necessary drainage.

This principle is thus declared by the Supreme Court in case of Drainage Districts:

> "The law permitting high lands irrigated by artificial means which are responsible in part for the swampy condition of lower lands to be assessed for a portion of the cost of constructing the drainage works is an exercise of that power whereby the legislature provides the means and methods by which one may so use his own property as not to injure that of another."
>
> (Burt et al., Com. Drainage Dist. No. 1, vs. Farmers Coop. Irr. Co. et al. (Idaho, Sept. 29, 1917), 30 Idaho 752.)

and in the same case the court has discussed the necessity for

drainage works in connection with irrigation in the following language:

> "It seems in this irrigated country the question of drainage is now confronting almost every irrigated section, and there seem very cogent reasons for a return to the former rule above stated (referring to the common law rule hereafter stated), at least to the extent of assessing lands for the construction of a drainage system from which seepage or percolation damages or injures other lands. The early settlers of the arid regions were not confronted with the question of drainage, but time and experience have proven that a drainage system is absolutely necessary where large areas of desert land are reclaimed by irrigation."

> "It is a well recognized fact that under many of the irrigation systems of our state thousands of acres of land which were reclaimed from an arid condition and which for a time produced valuable crops have now become alkalined or water-logged and thus ruined, and grow nothing but willows and tules because of the seepage of waters from canals and the irrigation of higher lands. And it certainly is not the public policy of the state to permit thousands, if not hundreds of thousands of acres of lands that were once productive to be ruined and made worthless, and leave the owners thereof remediless."

> (Burt et al., Com. Drainage Dist. No. 1, v. Farmers Coop. Co. et al., 30 Idaho 752.)

That the authority of the irrigation district to construct drainage works is due to the obligation of the district as a canal owner to protect the land within the district from seepage and overflow from its canal system is clearly indicated in the case of Bissett v. Pioneer Irrigation District, 21 Idaho 98, where the court said:

"The law clearly authorizes the formation of irrigation districts and procuring a sufficient supply of water for such purpose. If in the course of performing this work, seepage and percolating waters from the canal system flood and overflow the lowlands of landowners within the district, the district is certainly under an obligation to take care of such seepage or overflow and protect such land (Stuart v. Noble Ditch Co., 9 Idaho 755, 76 Pac. 255) and it would seem that the district would have the implied power to take such steps as would be necessary in order to protect landowners from damage or the loss of the use of their lands."

(Bissett v. Pioneer Irrigation District, 21 Idaho 98.)

"Upon the question of whether or not an irrigation district has a right to provide means and expend money for the drainage of overflowed lands within the district, this court, in the case of Bissett v. Pioneer Irr. Dist., 21 Idaho 98, 120 Pac. 461, expressed the opinion that such action might be taken. While the views there expressed were not essential to the determination of that case, a further investigation of the question convinces us of the correctness of the impressions the court then had on the subject and we adopt the views therein expressed as the opinion of the court and hold that an irrigation district possesses the powers necessary to drain its overflowed lands and to protect its landowners from seepage and overflow waters as well as to supply water to the dry and arid lands of the district."

(Pioneer Dist. v. Stone, 130 Pac. 382, 23 Ida. 344.)

"Under the laws of this state, an irrigation district may provide for the drainage and reclamation of lands within the district which have been flooded or water-logged by reason of overflow, percolation, or seepage from its irrigation works, and the accomplishment of such purpose is

one of the necessarily implied duties of the district as the irrigation of its dry and arid lands."

(Pioneer Irr. Dist. v. Stone, 23 Idaho 344, 130 Pac. 382.)

The reasoning of these cases applies with even greater force to the construction of drainage works under the Federal Reclamation Act. For in the Idaho Irrigation District laws there is no mention of anything but irrigation works and the power to construct drainage works is purely an implied power which arises from the necessity for drainage works in connection with irrigation works in order that the purpose of the irrigation laws may not be frustrated and all the benefits of irrigation lost, but in the Federal Act the term "Reclamation" is used repeatedly. The Act is entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands."

In Section 1 it is declared that the fund is to be known as the "Reclamation Fund" and used for the reclamation of arid and semi-arid land.

In Section 5 it is provided that the entryman must, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes.

It is evident that Congress intended that the land should be reclaimed, and we submit, that to convert an arid waste into a useless swamp and leave it in a condition as worthless as it was in the beginning would not be reclamation.

Reclamation is a broader term than irrigation. In fact in California, where most of our irrigation law originated, "Reclamation Districts" for drainage purposes preceded irrigation districts and when the question of the constitutionality of the irrigation district law was raised the decisions in regard to such Reclamation Districts for drainage purposes were cited in support of similar powers for irrigation purposes.

> (Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369.)

The term "Reclamation" has always been understood as implying drainage as much as irrigation.

Kinney in his work on irrigation discusses the question of drainage in connection with irrigation as follows:

> "The drainage of irrigated lands, and lands which lie below where irrigation operations are being carried on, has become almost as great a question from an economic standpoint, in many localities, as is the application of the water to the lands for irrigation. In the early history of irrigation, the lands adjoining the streams were first taken up and upon these irrigation operations were first commenced. These lands lying close to the natural stream required but little artificial drainage. But as time has gone on, the lands higher up and farther back from the stream were taken up and also irrigated. After this, it was found that the first farms were becoming too wet, caused by the seepage from the irrigation above them. This process has been repeated; and, as still higher lands were irrigated, in many instances, the first farms upon the lower lands have become practically swamps. It therefore naturally follows that, in order to develop these sections of the country to their full capacity, and not to retard their progress where they have been once developed,

the question of the drainage of these lands has become one of great economic importance. In fact, the two questions of irrigation and drainage must go hand in hand where this condition exists."

(Kinney on Irrigation and Water Rights (2nd Ed.), par. 38, page 57.)

Part of the water used for irrigation is used up in evaporation from the land and plant growth, but a part seeps or percolates down into the subsoil and if the natural drainage is insufficient to carry off this percolating water, the land will inevitably be swamped in a few years and become worthless and unproductive unless a system of drainage is constructed in connection with the irrigation system to take off the surplus water placed on the land through irrigation.

This court has declared that it was the intention of Congress that the Secretary of the Interior should collect the Government money invested under the Reclamation Act, without diminution.

(Swigart v. Baker, 229 U. S. 187, 57 L. Ed. 1143.)

But if the land is allowed to become seeped and worthless and the Secretary of the Interior is not permitted to employ the necessary means to prevent or remedy this condition, the security for the Government's investment would be lost and how could the Secretary collect the money invested?

To allow the land to become swamped and unproductive would defeat the entire purpose of the Reclamation Act. The expected reclamation of arid land, the increase in food production, the building of more homes on the land, and the increased

prosperity and well being of the whole country, which was expected to result from such reclamation, would not be accomplished and the money invested by the Government could not be collected from worthless and unproductive land.

Since Congress has imposed on the Secretary of the Interior the duty to accomplish two purposes, the reclamation of arid land, and the recovery of the money invested, it would be most unreasonable to suppose that Congress intended to deny him the right to use the best and in many cases the only means by which the required objects can be accomplished.

The Reclamation Act provided (Section 2) that the Secretary is authorized "to report to Congress at the beginning of each regular session as to the results of such examination and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of work in process of construction, as well as of those which have been completed."

It has been decided in the case of Swigart v. Baker, *supra*, that we may consider the annual reports of the Secretary of the Interior to Congress for the purpose of showing the practical construction placed upon the statute by the Secretary of the Interior and the knowledge of and acquiescence in such construction by Congress.

> "If there could be any doubt as to the meaning of the statute, it disappears in the light of Congressional construction which may properly be examined as an aid in its interpretation. (Burridge v. Detroit, 117 Mich. 557, 42 L. R. A. 684, 72 Am. St. Rep. 582, 76 N. W. 84. The

> Secretary of the Interior annually made reports to Congress in which these charges of maintenance and operation were shown. No adverse action was taken as to these assessments by the Secretary. On the contrary, Congress, in several instances, showed that it construed the act in the same way."
>
> (Swigart v. Baker, 229 U. S. 187, 57 L. Ed. 1143.)

As early as 1904, when the surveys and investigations for the first projects were only fairly under way, we find statements in the annual report showing that drainage was contemplated in connection with irrigation on the Federal Reclamation projects. For instance, the 3rd annual report, covering the work of 1903-1904, contains the following statement:

> "Surveys of the distributing lateral and *drainage canal system* are also being prosecuted, and preparations for constructing a part thereof are nearly complete."
>
> (3rd Annual Report (1903-1904), page 90.)

and each year thereafter as the work of the Reclamation Service progresses the references to drainage in connection with irrigation become more prominent and important until at the present time there is hardly a project where it has not been found necessary to construct some drainage works in connection with the irrigation works. The annual reports contain the following references to drainage on the Boise Project:

> "Drainage work—Construction with a drag-line excavator of a 4-mile drainage ditch from the Upper Deer Flat Embankment to Wilson Slough was begun in the spring of 1912, to carry away surface drainage from Deer Flat Reservoir and lower the water plane over the lands

below the Upper Deer Flat Embankment. Preliminary surveys are in progress on a general drainage system for the Pioneer Irrigation District, and negotiations are pending with the district on a plan for constructing some of the principal ditches."

(Eleventh Annual Report, page 75.)

"Drainage work.—The construction of the drainage ditch from the upper embankment was completed in March, 1913. This drain is approximately 4 miles long and was constructed to carry away surface drainage from the Deer Flat Reservoir and to drain lands in the immediate vicinity.

"On October 29, 1912, the voters of the Pioneer Irrigation District voted to enter into a contract with the United States involving the expenditure of $350,000 in the drainage of lands within the district, and $560,000 for storage capacity in Arrowrock Reservoir. This contract has been approved by the Secretary of the Interior and the purchase of the electric drag-line excavators has been authorized.

"Final and right of way surveys are in progress. A contract covering an exchange of power has been entered into between the United States and the Idaho-Oregon Light and Power Company and materials for transmission lines and transformer stations are under consideration."

(Twelfth Annual Report, page 87.)

"Drainage.—Under the provision of a contract entered into with the Pioneer Irrigation District, drainage work was begun in that district in November, 1913. From that time until the end of the fiscal year the work was prosecuted practically continuously by means of two electrically operated, drag-line excavators. On July 30, 1914, the Elijah and Mason Creek drains were about completed.

These are both open drains located in natural depressions. They are intended to serve for carrying the surface waters which accumulated from irrigation and other sources in these low depressions, as well as for lowering and controlling the ground waters. The drains are consequently classed as deep drains.

"In all of the drains so far constructed large amounts of water have been developed. This has resulted in a drying up and lowering of the ground-water table in the slough. The effect of this lowering of the water table in the depressions is also to cause a general lowering over the higher areas adjacent thereto which were gradually becoming threatened. The results so far accomplished seem to indicate that deep open drains so located in the low depressions as to intercept the underground flow toward them will be effective in a great measure in lowering and controlling the water table of the district. These drains will also act as main outlets for the drainage of the project lands situated above the Pioneer district.

"In addition to the drainage work carried on in the Pioneer district preliminary surveys and estimates have been made covering drains in portions of the Nampa-Meridian and Fargo districts."

(Thirteenth Annual Report, page 107.)

"Drainage.—The drainage system contemplated by the original contract with the Pioneer Irrigation District has been completed during the year.

"The drainage surveys in the Nampa-Meridian Irrigation District have progressed satisfactorily during the year. The contract between the district and the United States has been ratified by a large majority of the residents of the district at a special election held for that purpose and the proceedings have been approved by the district court.

"A supplementary contract for additional drains has been voted by the residents of the Pioneer Irrigation District and has been approved by the district court.

"The drainage system in the Fargo Basin, embodying about 5,000 acres in the Boise project, was started during the latter part of 1914 and completed in the spring of 1915. The beneficial results of these drains were immediate and far-reaching. In all of the drains so far constructed large amounts of water have been developed and returned to the river to be used for further irrigation. The lands adjacent to these drains, formerly waterlogged, are now being put back into cultivation."

(Fourteenth Annual Report, page 90.)

The Act of Congress of August 13, 1914, (38 Stat. 686), known as the Reclamation Extension Act, provides:

"16. That from and after July first, nineteen hundred and fifteen, expenditures shall not be made for carrying out the purposes of the reclamation law except out of appropriations made annually by Congress therefor, and the Secretary of the Interior shall, for the fiscal year nineteen hundred and sixteen, and annually thereafter, in the regular Book of Estimates, submit to Congress estimates of the amount of money necessary to be expended for carrying out any or all of the purposes authorized by the reclamation law, including the extension and completion of existing projects and units thereof and the construction of new projects. The annual appropriations made hereunder by Congress for such purposes shall be paid out of the reclamation fund provided for by the reclamation law."

(Sec. 16, Act of August 13, 1914, known as Reclamation Extension Act.)

and each year since 1914 the Secretary of the Interior has submitted to Congress his estimates of the amount of money necessary for carrying out all work contemplated for the following year under the Reclamation Act, and Congress itself has made the appropriations for the contemplated work upon the recommendations and estimates furnished by the Secretary of the Interior in the regular book of estimates.

A comparison of the appropriations made each year by Congress for each of the Reclamation Projects as shown by the items in the Sundry Civil Appropriation Bill, with the recommendations of the Secretary of the Interior in the book of estimates, shows that Congress has appropriated for each project the exact amount recommended by the Secretary of the Interior to the last cent, including the amounts recommended for drainage, and the Secretary in his recommendations and estimates plainly stated that part of the appropriation requested was to be used for drainage.

For instance, the estimate and recommendation of the Secretary of the Interior for the fiscal year 1917, which began July 1, 1916, contains a recommendation for a total appropriation of $540,000 for the Boise Project, of which it is stated that $247,500 is to be spent on the drainage system in connection with that project, and it is further explained in the printed statement furnished to Congress by the Secretary in connection with his estimates, as follows:

"Drainage."

"This item of the estimate is mainly to cover the continuation of the Nampa Meridian Irrigation District

drainage under the existing contract between the United States and the District. It is also probable that, due to litigation, some of the Pioneer Irrigation District drainage now under way will remain to be done during the fiscal year 1917."

(Page 19 of Proposed Work on Reclamation Projects during fiscal year 1917, together with estimates of cost.)

and the Sundry Civil Bill passed by the Sixty-fourth Congress, Session 1, provides:

"The following sums are appropriated out of the special fund in the Treasury of the United States created by the Act of June 17, 1902 (32 Stat. L. 388) and therein designated the 'Reclamation Fund': Boise Project, Idaho—For maintenance, operation, continuation of construction —$540,000."

(39 Stat. at Large, page 304.)

Similar provisions for drainage appear in connection with the estimates for nearly all the Reclamation projects, and in each case the amount recommended by the Secretary, including the amount which he stated that he wanted for drainage work, is found to be the exact amount appropriated by Congress for each project respectively, and this is true of each yearly appropriation bill passed by Congress since Congress began appropriating the fund under the provisions of Section 16 of the Reclamation Extension Act.

We must conclude that Congress not only acquiesced in the interpretation put upon the Act by the Interior Department,

but that Congress itself being fully informed of the use intended to be made of the money, appropriated it for that purpose.

Respectfully submitted,

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WILL R. KING,

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Attorneys for Defendants in Error.

Residence: Boise, Idaho.

Service of the foregoing brief by copies thereof is hereby acknowledged by plaintiffs in error this_____day of April, 1918.

_____

_____

_____

Attorneys for Plaintiffs in Error.

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1917.

No. 291.

JAMES G. PETRIE,
OLIVER O. HAGA,
R. F. BLUCHER, et al.,
Plaintiffs in Error,
vs.
NAMPA & MERIDIAN IRRIGATION DISTRICT,
Defendants in Error.

MOTION TO DISMISS

In Error to the Supreme Court of the State of Idaho.

Comes now the Defendant in Error and moves the Court to dismiss the Writ of Error in this case on the following grounds:

1st. Because the judgment of the Supreme Court of Idaho to which said Writ of Error was directed is not a final judgment.

2nd. That there is no Federal question involved.

3rd. That the highest court of the state in rendering judgment decided against the Plaintiffs in Error upon an independent ground not involved in a Federal question, and broad enough to support the judgment.

4th. That the proceeding before the Supreme Court of Idaho in this case is a proceeding to obtain a judicial opinion, upon which the parties might base further action and after all nothing but a proceeding to secure evidence, and that in the securing of such evidence no right protected by the Constitution or Statutes of the United States is invaded.

H. E. McELROY,
Address: Boise, Idaho.
B. E. STOUTEMYER,
Address: Boise, Idaho.
Counsel for Defendant in Error.

To MESSRS. J. B. ELDRIDGE, JAMES H. RICHARDS and OLIVER O. HAGA, *Attorneys for Plaintiffs in Error*:

Please take notice that on the 10th day of April, 1918, the Motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the court thereon. Annexed hereto is a copy of our Brief and argument in support of said Motion.

H. E. McELROY,
B. E. STOUTEMYER,
Counsel for Defendant in Error.

Service of the foregoing Motion and Notice and of the annexed Brief and argument by delivery of a copy thereof to me at my office in Boise, Idaho, this 9th day of March, 1918, is hereby acknowledged.

J. B. ELDRIDGE,
JAMES H. RICHARDS,
OLIVER O. HAGA,
Attorneys for Plaintiffs in Error.

SUPREME COURT
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BRIEF AND ARGUMENT OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS.

In Error to the Supreme Court of the State of Idaho.

The case at bar is a special statutory proceeding under Section 2401 Idaho Revised Codes. The language of the Statute is as follows:

> "The Board of Directors of the irrigation district shall file in the District Court of the County in which their office is situated a petition praying in effect that the proceedings aforesaid may be examined, approved and confirmed by the court."

This section further provides:

> "That after the organization of the district is complete, a petition may be filed for the confirmation of the proceedings so far, or after the authorization of any issue of bonds such petition may be filed."

In Section 2397 Idaho Revised Codes, it is provided:

> "After such authorization of indebtedness shall have been made by the voters evidenced by such bond election, the board of directors may, instead of issuing bonds in the manner provided in this title, enter into an obligation or contract with the United States for the construction of the necessary works under the provisions of an act of Congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June 17, 1902, and the rules and regulations thereunder; or the board of directors may issue bonds for a portion of the amount of indebtedness authorized by such bond election and enter into an obligation or contract with the United States to the extent of the remainder of such amount."

And Section 2398 Idaho Revised Codes provides:

> "Whenever any amount of money shall have been advanced by the United States for the construction of irrigation works, contemplated under the provisions of this title, by the authority of said act of Congress, the taxing powers of the district, as provided in this title, shall be used to repay into the treasury of the United States the amount of money so advanced in the manner contemplated in this title, and as may be provided in such contract between the directors of said district and the United States; and such levies and assessments shall be made each year under the authority of the district as will return to the treasury of the United States the amount or proportion of such money advanced as may have been agreed

> to in such contract. The works constructed under the provisions of such contract with the United States shall be controlled and administered by the district in accordance with the provisions of said act of Congress and the regulations thereunder."

The Nampa & Meridian Irrigation District was organized and the organization confirmed by Decree of the Court a number of years prior to the proceedings involved in this suit. (Par. 2 Amended Petition, pages 3 and 4 transcript admitted par. 2 of Answer page 31 transcript).

This case was brought under the provisions of Section 2401 quoted above to secure a judicial opinion as to the regularity and validity of the election and other proceedings authorizing the Directors of the District to enter into a contract with the United States, the procedure in authorizing such contract being the same as in the case of a bond issue.

At the time the petition was filed in this case no apportionment of benefits had been made and no assessment of any kind levied under the proposed contract and no apportionment of benefits or assessment of any kind is included in the proceedings described in the petition and before the State Court in this case.

The case was brought for the purpose of securing a judicial opinion as to the regularity and validity of the proceedings authorizing the execution of a proposed contract which was as yet unsigned.

The question of the apportionment of benefits and the question of what, if any, tax shall be levied against any tract of land in the District is a question to be determined at a later date and which will come before the court in another case

when the Directors of the District file their petition under the State Law for confirmation of their apportionment of benefits, but is a question which is not before the court in this case.

The answer admits the material allegations of the petition (see par. 1 and 2, 3, 6, 7 and 8 of the Answer, pages 31, 32, and 36 of the transcript admitting par. 1 and 2 and 6 to 15 of the amended petition).

In these admitted paragraphs, petitioners alleged due performance of each and every act which they were required to perform under the provisions of Sec. 2396 R. C. Idaho. Hence, in this case defendants have admitted:

1. That the district by a resolution entered on its records formulated a general plan of its proposed operation.

2. That for the purpose of ascertaining the cost, surveys were made under the direction of competent engineers.

3. These were submitted to the State Engineer and were approved by him.

4. The board determined the amount necessary and called an election and submitted the question to the voters of the district.

5. The election was held in the manner provided by law, 1206 votes were cast for and 160 against the contract, and more than two-thirds of the electors voting for the contract, it was declared carried and these proceedings have been brought for the purpose of securing a judicial review of the proceedings to this point.

In this case the contract with the Government constitutes the "plan" required by the statute and when it is conceded that the

proceedings of the board of directors have been regular and the requirements of the law fully carried out, we contend that there is nothing further to be determined in the case.

The Defendants in the trial court improperly attempted to inject into this case a lengthy discussion of the benefits which they apprehended might be apportioned against certain tracts of land in the District, and in order to raise that question alleged in their answer affirmative matters involving it, which were wholly immaterial and also filed a cross complaint, and in support of such irrelevant matter introduced oral testimony.

But the Supreme Court of the State decided:

> "This case was tried in the district court upon the theory that this was a special proceeding brought for the express purpose of having the proceedings authorizing the Nampa & Meridian Irrigation District to enter into the contract under consideration examined, approved and confirmed by the district court. Counsel for appellants have taken the position, and we think erroneously, that this action was brought not only for that purpose but also for the purpose of the apportionment of benefits under sec. 2399 Rev. Codes; and in order to raise this question they alleged in their answer affirmative matters involving it which were wholly immaterial and which should have been stricken from the answer. The cross-complaint and the answer to the cross-complaint were likewise immaterial and were subject to the same motion. The district court did not find upon any of these matters, for the reason that they were immaterial in this proceeding. We think that this conclusion reached by the trial court was correct."
>
> (Page 80 of Transcript, reported 153 Pac. 425.)

and determined the limits of the issue involved in this case in the following language:

> "This is a special statutory proceeding authorized by sec. 2401, Rev. Codes, which provides, among other things: 'The board of directors of the irrigation district shall file in the District Court of the county in which their office is situated a petition, praying in effect that the proceedings aforesaid may be examined, approved and confirmed by the court. * * * That after the organization of the district is complete, a petition may be filed for the confirmation of the proceedings so far, or after the authorization of any issue of bonds such petition may be so filed, * * *;' and is brought for a confirmation to the extent only of determining the legality of the proceedings authorizing the district to enter into the contract with the United States, and not for the purpose of the assessment of benefits to the lands within the irrigation district."
>
> (Page 75 of Transcript.)

This irrelevant and improper affirmative matter in the answer and cross-complaint and the oral testimony in support thereof concerning the assessments which appellants fear may be levied under an apportionment of benefits which they apprehend may be made under a contract which they surmise may be signed, none of which had been done at the time the petition in this case was filed, an issue concerning an apprehended apportionment of benefits which is no part of the proceeding involved in this case but a matter to be taken up at a later date in another case, is the basis of appellants entire argument both in this court and in the State Court, and assuming that the evidence when produced in the case to be hereafter brought to determine the apportionment of benefits, will show that certain tracts of land in the district referred to as the Blucher and

Haga tracts already have a water right (which the district denies) and assuming further that such water rights, if any, are adequate and sufficient water rights (although appellant Haga has admitted that his alleged right, a waste water right, is inadequate and insufficient, see pages 60 and 61 of transcript) and assuming further that the said tracts of land will receive no benefits under the proposed contract, and assuming further that if the evidence when properly presented in the apportionment case to be hereafter brought should show the facts to be as appellants claim them to be, the District Court would refuse to carry out the law and refuse to cancel the assessment, and assuming further that the Supreme Court of the State of Idaho would sustain the District Court in such refusal, the Plaintiffs in Error who were the Defendants in the trial court, have asked this court to set aside the judgment of the Supreme Court of the State on the ground that that judgment deprives them of their property without due process of law.

The laws of the State of Idaho as construed by the Supreme Court of that state, require that the issue as to the apportionment of benefits should be presented at the proper time and place and in the proper cause of action, namely, the action to be filed at a later date for confirmation of the apportionment of benefits and will not permit the appellants to present the issue prematurely by injecting it in an irregular and improper manner into a case brought for the purpose of confirming the regularity and validity of the election and other proceedings, authorizing the Directors of an irrigation district to sign a proposed contract with the United States.

This does not mean that the appellants will not have their

day in court on the question of the proper apportionment of benefits under the contract.

To the contrary, it is made exceedingly plain that they will have every opportunity to be heard on that question in the proper form of action and at the proper time. The State Court says:

> "Accordingly, if there are any lands within the Nampa & Meridian Irrigation District which are subject to irrigation from the waters received under the contract from the Boise Project, which have a water right in whole or in part, or that will not be benefited by reason of the contract entered into between the United States and the irrigation district, said lands will not be subject to assessment in excess of benefits."
>
> "Sec. 2400, Rev. Codes, provides that notice shall be given to each of the landowners of the time and place the board of directors will make the assessment of benefits, when a hearing will be given to each owner of land within the district and his lands will be classified and assessed according to benefits received. Should any landowner make objection to said assessment or any part thereof befor said board and said objection is overruled by the board and the landowner does not consent to the assessment as finally determined, such objection shall, without further proceedings, be regarded as appealed to the district court and to be heard at the said proceedings to confirm as aforesaid. Like objections may be urged by landowners who may be affected by the drainage system or stored supplemental water rights."
>
> "Sec. 2403, Rev. Codes, among other things, provides:
>
> " 'The Court shall disregard every error, irregularity or ommission which does not affect the substantial right of any party, and if the court shall find that said assessment, list and apportionment are in any substantial matter erroneous or unjust, the same shall not be returned to said board, but the court shall proceed to correct the same

so as to conform to this title and the rights of all parties in the premises, and the final order or decree of the court may approve and confirm such proceedings in part, and disapprove other parts of said proceedings; and * * * the court shall correct all the errors in the assessment, apportionment and distribution of costs as above provided, and render a final decree approving and confirming all of the said proceedings * * *.'"

"A judgment of the district court in affirming the proceedings of the irrigation district in entering into a contract with the United States to supply water to irrigate lands within the district and to provide for the joint construction of a drainage system, is not *res judicata*, so far as the assessment of benefits to the lands within the district is concerned, and does not preclude statutory proceedings for such assessment."

(Pages 76 and 77 of Transcript.)

The State Court decided against the Plaintiffs in Error on the ground that the issue in regard to the proper apportionment of benefits is not properly before the court in this case.

This is very similar to the question considered by this court in the case of New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. Ed. 1158.

In stating the facts in that case the Court said:

"Petitioners rely in this case upon the fact that the property assessed consists solely of a roadway through Park avenue or Vanderbilt Ave. East, depressed from 10 to 18 feet below the grade of the street, the sides of which depression are held in place and faced by a retaining wall, surmounted by an iron fence, whereby all access to and from the roadway to the street is rendered impossible, except at the intersection of side streets, where bridges are built for the accommodation of traffic. Their claim is that no possible benefit had, would, or could inure to the benefit of the railway companies by the construction of the pro-

posed improvements; and all the oral testimony tended to show that fact."

And the court expressed its conclusion in the following language:

> "Not only was there no federal question raised in the record, but the appellate division made no allusion to such a question, and dismissed the petition on the *ground that the charter of New York did not permit a question of benefit or no benefit to be raised in such a proceeding—a ground wholly independent of a Federal question.*"
>
> (New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. Ed. 1158.)

We do not believe that there is any federal question at all involved in this case, but if there is such federal question, it is certain that there is also a non-federal question, broad enough to support the judgment of the State Court.

It has frequently been decided by this court that:

> "The decision of a Federal question by a State Court will not prevent dismissal of a writ of error from the Supreme Court, if the State Court also decided against the Plaintiff in Error upon an independent ground not involving a Federal question and broad enough to support the judgment."
>
> (Rutland R. Co. v. Central Vermont R. Co., 159 U. S. 630, 40 L. Ed. 284.)

In that case the Court said:

> "It is well settled by a long series of discussions of this court that where the highest court of the state, in rendering judgment decides a Federal question, and also decides against the Plaintiff in Error upon an independent ground not involved in a federal question and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question."

Murdock v. Memphis, 87 U. S. 20;

Jenkins v. Loewenthal, 110 U. S. 222;

Beaupre v. Noyes, 138 U. S. 397;

Wood Mowing & R. Mach. Co. v. Skinner, 139 U. S. 293.

Hammond v. Johnson, 142 U. S. 73;

Tyler v. Cass County, 142 U. S. 288;

Delaware Co. v. Reybold, 142 U. S. 636;

Eustis v. Bolles, 150 U. S. 361.

in the last two of which many other cases to the same effect are cited."

(Rutland R. Co. v. Central Vermont, 159 U. S. 630, 40 L. Ed. 284.)

Moreover in an irrigation district case involving the very same procedure now under consideration, this court has decided that the question involved in a procedure of this kind is merely a moot question so far as the Supreme Court of the United States is concerned and presents no appealable issue of any kind whatever.

(Tregea v. Modesto Irr. Dist., 164 U. S. 179, 41 L. Ed. 395.)

In this case the Court said:

"Some light may be thrown on this question by reference to a matter of a somewhat kindred nature. In states which provide for the organization of corporations under general statute different modes of procedure are prescribed. In some states it is sufficient for the parties desiring to incorporate to prepare a charter, acknowledge it before some official, and file it with the secretary of state, or other public officer, and the certificate of such officer is

made the evidence of the incorporation. In other states the parties may file a petition in some court, and that court upon presentation thereof examines into the propriety of the incorporation, and if satisfied thereof enters a decree declaring the petitioners duly incorporated, and the copy of such decree is the evidence of the incorporation. Does the difference in procedure between these two cases create any essential difference in character? Is the one executive and the other judicial? Suppose, in the latter case, the statute had provided that either one of the petitioners might appeal from the decree of a lower to the supreme court of the state, in order to obtain a final adjudication in favor of the propriety of such incorporation, would this court entertain a suit in error to reverse such adjudication by the highest court of the state? Would it not be held in effect, whatever the form, a mere *ex parte* case to obtain a judicial opinion, upon which the parties might base further action? It seems to us that this proceeding is after all nothing but one to secure evidence, that in the securing of such evidence no right protected by the Constitution of the United States is invaded, that the state may determine for itself in what way it will secure evidence of the regularity of the proceedings of any of its municipal corporations, and that unless in the course of such proceeding some constitutional right is denied to the individual, this court cannot interfere on the ground that the evidence may thereafter be used in some further action in which there are adversary claims. So on this ground, and not because no Federal question was insisted upon in the state court, the case will be dismissed."

(Tregea v. Modesto Irr. Dist., *supra.*)

Respectfully submitted,

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10